UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals

FEDERAL COURT — CIVIL APPEAL NOS 02–32 OF 2007(W), 02–33 OF 2007(W) AND 01–9 OF 2007(W)
ZAKI AZMI CHIEF JUSTICE, ABDUL AZIZ MOHAMAD AND ZULKEFLI FCJJ
9 DECEMBER 2008

Tort — Damages — Nuisance — Claim for pure economic loss — Whether in light of Highland Towers' case, pure economic loss recoverable against local authority and/or government

Tort — Nuisance — Public nuisance — Closure of public road by local authorities caused respondent's business to collapse — Road closure pursuant to temporary occupational licence (TOL) — Whether act done pursuant to TOL was defence to claim for public nuisance and/or breach of statutory duty — Whether provisions of ss 12 and 46 of the Street Drainage and Building Act 1974 conferred right of action against local authority in respect of road closure — Whether respondent entitled to pure economic loss

The judgment related to three appeals which involved the same subject matter. Koperasi Pasaraya Malaysia Bhd, the plaintiff/respondent in all the three appeals, operated a supermarket along Jalan Haji Hussein, Kuala Lumpur. The main entrance to the supermarket was at Lorong Haji Hussein 3 ('LHH3') where 35 car parking bays were located. UDA Holdings Bhd (UDA), the first defendant/appellant owned a piece of land in the vicinity ('UDA's land') on which it intended to construct two multi storey buildings. Unfortunately there were a number of unlicensed hawkers occupying UDA's land. Therefore UDA working with the Dato' Bandar Kuala Lumpur (DBKL), the second defendant/appellant, decided to locate these hawkers to LHH3, a public street. In order to utilise LHH3 for the purpose of relocating the hawkers, the DBKL proposed to close LHH3 to traffic. With the road closure, LHH3 became just an empty piece of land and therefore UDA and the DBKL applied to the land administrator for Wilayah Persekutuan Kuala Lumpur, the third defendant/appellant ('the government'), to have LHH3 converted from a public road into a temporary occupational licence ('TOL'). The application was granted and a TOL under s 65 of the National Land Code ('NLC') was issued to UDA. The respondent alleged that the road closure and the relocation of the hawkers to LHH3 had caused the number

of customers coming to its supermarket to dwindle and that its business had been severely affected financially. The respondent therefore brought a claim against UDA, DBKL and the government. The cause of action was founded on public nuisance and breaches of statutory duties by all three parties. The High Court found that the closure of LHH3 was the joint action of UDA, DBKL and the government, that it caused a public nuisance, especially to the respondent, and that the collapse of the respondent's business was entirely due to the road closure. Dissatisfied with the decision of the High Court the appellants individually appealed to the Court of Appeal which unanimously agreed with the trial judge's finding of liability for public nuisance against the three appellants. In addition they also found the DBKL liable for breaches of statutory duty by contravening ss 12 and 46 of the Street Drainage and Building Act 1974 ('the Act') and that as against the DBKL, the claim in economic loss to be only recoverable under the head of breach of statutory duty. Dissatisfied with the decision of the Court of Appeal, the appellants sought and obtained leave to appeal against the decision of the Court of Appeal. The questions for determination raised by the appellants before the Federal Court involved both issues of liability and quantum. On the issue of liability the questions for determination were whether an act done pursuant to a TOL such as the closing of a public road was a defence to a claim for public nuisance and/or breach of statutory duty and whether the provisions of ss 12 and 46 of the Act conferred a right of action against a local authority in respect of a road closure undertaken pursuant to the issuance of a TOL. On the issue of quantum the court had to consider whether in the light of *Majlis Perbandaran Ampang Jaya v Stephen Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 ('the *Highland Towers* case') pure economic loss was recoverable against a local authority and/or the government, on the assumption there was liability.

Held, dismissing all the appeals but finding the DBKL and the government not liable for pure economic loss suffered with UDA liable to one-third of the total economic loss with costs to the respondent:

(1) (per **Zaki Azmi Chief Justice**) The dates of the road closure and the issue of the TOL seemed to not be in order. The TOL was issued on 9 September 1996 and made to run retrospectively from 10 August 1996. The TOL was issued for the purpose of constructing temporary stalls for the hawkers. However, the development order for the proposal to build the temporary stalls on LHH3 was made even before the road was closed. A proper order would be for the road to be first closed and then for the TOL to be issued before the development order is issued. However, in this case the problem arose because the TOL was issued over LHH3 even before the road was closed to traffic. The net effect of

this was that the TOL over LHH3 was granted by the administrator even before the road ceased to become a public road (see paras 5–6 & 21).

(2) (per **Abdul Aziz Mohamad FCJ**) The issue of the TOL as a defence to a claim for public nuisance and/or breach of statutory duty arose because the Court of Appeal rejected the issuance of the TOL as common defence by the three appellants. There was in law, no duty or obligation on DBKL to ensure that the TOL achieved its purpose. DBKL exercised his statutory powers under the road transport and planning statutes pursuant to an understanding with UDA and the government to temporarily locate the hawkers on LHH3. Therefore the trial judge was correct to find, UDA, DBKL and the government to be acting in concert because otherwise, a TOL would not have been issued over a public street. As such, the TOL could not be a statutory defence to the claim in public nuisance because the issuance of the TOL over LHH3 was not authorised by Parliament and the closure of LHH3 was not the inevitable result of the issuance of the TOL (see paras 40, 49, 51 & 93).

(3) (per **Zulkefli FCJ** dissenting) It is an established rule of interpretation that statutory instruments or administrative orders are presumed valid until set aside by a court of law. By s 65(1) and (2) of the NLC the relevant authority may issue a TOL over state land for any purpose and the reasonableness of that decision may be challenged in judicial review proceedings where it impacts adversely on the legal rights of others. However, since the respondent had failed to do this the TOL issued in the present case was valid and effective and all parties were obliged to recognise it. As such, the TOL and the two subsequent orders issued, namely the road closure order and the development order must be taken to have remained in force unless invalidated by a court of law. In addition, on this point, s 114(e) of the Evidence Act 1950 makes the presumption that all official acts are deemed valid unless proven otherwise. Therefore the Court of Appeal in holding that the TOL was not a defence to the respondent's claim in public nuisance or breach of statutory duty had ignored this established rule of presumption of validity of statutory instruments or orders or administrative orders unless quashed or set aside in judicial proceedings brought for that purpose and had failed to consider the relevant provisions of the NLC under which the TOL was issued or the statutory provisions under which the road closure order and the development order were issued (see paras 112–113, 116 & 118).

(4) (per **Zaki Azmi Chief Justice** and per **Abdul Aziz Mohamad FCJ**) Section 12 of the Act is not to be read as imposing an obligation to continue to keep a public street as a public street but rather to keep it

under repair. Section 46(4) of the Act empowers the local authority to allow temporary erections for purposes of festivals and ceremonies and not for the purpose for which LHH3 was in fact closed. As such ss 12 and 46 of the Act do not confer a right to the local authority to close LHH3 just because a TOL under s 65 of the NLC had been issued (see paras 9–11).

(5) (per **Zulkefli FCJ** dissenting) The authorities on pure economic loss show that the courts would disallow claims for pure economic loss unless the claim was in respect of a definite amount which had already been paid by the appellant and it was that amount only which the appellant then sought to recover. In addition, the *Highland Towers* case had decided, largely on public grounds, that there should be no recovery for economic loss against a local authority. In the present case, in determining whether a claim for recovery of economic loss was recoverable from an alleged breach of statutory duty, it was important for the court to have regard to the overall scheme of the relevant statute. Based on the preamble to the Act there was nothing to suggest that it was intended to provide compensation for financial loss in the manner sought by the respondent. The terms of ss 12 and 46 of the Act show that it precludes any construction that any breach thereof would result in a party being able to claim financial loss arising therefrom. Therefore the Court of Appeal was in error in holding that the DBKL was liable for economic loss by reasons of alleged breaches of its statutory duty (see paras 141, 155 & 157).

(6) (per **Zaki Azmi Chief Justice**) The respondent was not entitled to pure economic loss resulting from breach of statutory duty and tort committed by the DBKL and the government. However, UDA was liable for pure economic loss against the respondent with the award of such loss limited to one-third of the total pure economic loss (see paras 13–14).

(7) (per **Abdul Aziz Mohamad FCJ**) The ruling of the court in the *Highland Towers* case on the question of pure economic loss was that each case had to be considered, with the application of s 3(1) of the Civil law Act 1956, on its own facts and circumstances. The court did not make a ruling that precludes a claim for pure economic loss against a local authority (see para 54 & 80)

[Bahasa Malaysia summary

Penghakiman adalah berkaitan dengan tiga rayuan yang melibatkan subjek yang sama. Koperasi Pasaraya Malaysia Bhd, plaintif/responden di dalam ketiga-tiga rayuan, mengusahakan pasar raya di Jalan Haji Hussein, Kuala Lumpur. Pintu masuk utama ke pasar raya tersebut adalah di Lorong Haji

Hussein 3 ('LHH3') di mana terdapatnya 35 tempat letak kereta. UDA Holdings Bhd ('UDA'), defendan/perayu pertama memiliki sebidang tanah di kawasan sekitar ('tanah UDA') di mana ia merancang untuk membina dua bangunan bertingkat. Malangnya, terdapat sebilangan penjaja tanpa lesen menduduki tanah UDA. Oleh itu, UDA bekerjasama dengan Dato' Bandar Kuala Lumpur ('DBKL'), defendan/perayu kedua, mengambil keputusan untuk menempatkan penjaja-penjaja tersebut di LHH3, satu lorong awam. Bagi menggunakan LHH3 bagi tujuan penempatan semula penjaja-penjaja, DBKL mencadangkan untuk menutup laluan LHH3. Dengan penutupan jalan tersebut, LHH3 menjadi sebidang tanah yang kosong dan oleh itu UDA dan DBKL telah memohon kepada pentadbir tanah Wilayah Persekutuan Kuala Lumpur, defendan/perayu ketiga ('kerajaan'), untuk menukarkan LHH3 daripada satu jalan awam kepada lesen pendudukan sementara ('TOL'). Permohonan telah dibenarkan dan satu TOL di bawah s 65 Kanun Tanah Negara ('KTN') telah dikeluarkan kepada UDA. Responden mendakwa bahawa, penutupan jalan dan penempatan semula penjaja-penjaja ke LHH3 telah menyebabkan pelanggan yang datang ke pasar rayanya semakin merosot dan memberikan kesan kewangan yang teruk kepada perniagaannya. Oleh itu responden telah membawa tindakan terhadap UDA, DBKL dan kerajaan. Kausa tindakan adalah berdasarkan kepada kacau ganggu awam dan kemungkiran tanggungjawab statutori oleh semua ketiga-tiga pihak. Mahkamah Tinggi, memutuskan bahawa, penutupan LHH3 adalah tindakan bersama UDA, DBKL dan kerajaan, yang ianya menyebabkan kacau ganggu awam, terutama kepada responden, dan kejatuhan perniagaan responden keseluruhannya adalah disebabkan oleh penutupan jalan tersebut. Tidak berpuas hati dengan keputusan Mahkamah Tinggi perayu-perayu secara individu telah merayu kepada Mahkamah Rayuan yang secara sebulat suara bersetuju dengan keputusan hakim bicara berkenaan dengan liabiliti untuk kacau ganggu awam terhadap ketiga-tiga perayu. Sebagai tambahan, mereka juga mendapati DBKL bertanggungjawab bagi kemungkiran tanggungjawab statutori dengan menyalahi ss 12 dan 46 Akta Jalan, Saliran dan Bangunan 1974 ('Akta') dan sebagaimana terhadap DBKL, tuntutan di dalam kerugian ekonomi hanya boleh didapatkan kembali di bawah tajuk kemungkiran tanggungjawab statutori. Tidak berpuas hati dengan keputusan Mahkamah Rayuan, perayu-perayu memohon dan mendapatkan kebenaran untuk merayu terhadap keputusan Mahkamah Rayuan. Soalan-soalan untuk dipertimbangkan yang ditimbulkan oleh perayu-perayu di hadapan Mahkamah Persekutuan melibatkan kedua-dua isu liabiliti dan kuantum. Atas isu liabiliti soalan-soalan untuk dipertimbangkan adalah sama ada tindakan yang dilakukan menurut TOL seperti penutupan jalan awam adalah satu pembelaan kepada tuntutan kacau ganggu awam dan/atau kemungkiran tanggungjawab statutori dan sama ada peruntukan ss 12 dan 46 Akta memberikan hak mengambil tindakan terhadap pihak berkuasa tempatan berkenaan dengan penutupan jalan yang berlaku menurut pengeluaran TOL. Atas isu kuantum, mahkamah perlu mempertimbangkan

sama ada menurut kes *Majlis Perbandaran Ampang Jaya v Stephen Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 ('kes *Highland Towers*') kerugian ekonomi tulen boleh diperoleh semula terhadap pihak berkuasa tempatan dan/atau kerajaan, atas anggapan terdapat liabiliti.

Diputuskan, menolak kesemua rayuan, tetapi memutuskan DBKL dan kerajaan tidak bertanggungan untuk kerugian ekonomi tulen yang ditanggung dengan UDA bertanggungan kepada satu per tiga daripada keseluruhan kerugian ekonomi dengan kos terhadap responden:

(1) (oleh **Zaki Azmi Ketua Hakim Negara**) Tarikh-tarikh penutupan jalan dan pengeluaran TOL kelihatan tidak teratur. TOL telah dikeluarkan pada 9 September 1996 dan dilaksanakan secara retrospektif dari 10 Ogos 1996. TOL telah dikeluarkan untuk tujuan pembinaan gerai sementara untuk para penjaja. Tetapi, arahan pembangunan untuk cadangan membina gerai sementara di LHH3 telah dibuat sebelum jalan ditutup. Arahan yang sewajarnya adalah jalan ditutup dahulu dan kemudian pengeluaran TOL sebelum arahan pembangunan dikeluarkan. Tetapi, di dalam kes ini, masalah timbul kerana TOL telah dikeluarkan ke atas LHH3 walaupun sebelum jalan ditutup kepada laluan. Kesannya adalah bahawa TOL ke atas LHH3 telah diberikan oleh pentadbir walaupun sebelum jalan tersebut tidak lagi menjadi jalan awam (lihat perenggan 5–6 & 21).

(2) (oleh **Abdul Aziz Mohamad HMP**) Isu TOL sebagai pembelaan kepada tuntutan bagi kacau ganggu awam dan/atau kemungkiran tanggungjawab statutori timbul kerana Mahkamah Rayuan telah menolak pengeluaran TOL sebagai pembelaan biasa oleh ketiga-tiga perayu. Adalah dalam undang-undang, bukan tugas dan kewajipan ke atas DBKL untuk memastikan bahawa TOL mencapai matlamatnya. DBKL melaksanakan kuasa statutorinya di bawah undang-undang pengangkutan jalan dan rancangan berikutan persefahaman dengan UDA dan kerajaan untuk secara sementara menempatkan penjaja-penjaja di LHH3. Oleh itu hakim bicara adalah benar memutuskan, UDA, DBKL dan kerajaan bertindak secara bersesama kerana jika tidak, TOL tidak akan dikeluarkan ke atas jalan awam. Oleh itu, TOL tidak boleh menjadi pembelaan statutori kepada tuntutan di dalam kacau ganggu awam kerana pengeluaran TOL ke atas LHH3 adalah tidak diberikan kuasa oleh Parlimen dan penutupan LHH3 adalah akibat yang tidak dapat dielakkan dengan pengeluaran TOL tersebut (lihat peranggan 40, 49, 51 & 93).

(3) (oleh **Zulkefli HMP** menentang) Adalah peraturan pentafsiran yang ditetapkan bahawa surat cara statutori atau arahan pentadbiran adalah dianggap sah sehinggalah diketepikan oleh mahkamah. Melalui s 65(1)

dan (2) KTN pihak berkuasa yang relevan boleh mengeluarkan TOL terhadap tanah negeri untuk apa jua tujuan dan kemunasabahan keputusan tersebut boleh dicabar di dalam prosiding semakan kehakiman di mana ianya memberikan kesan yang buruk ke atas hak undang-undang pihak lain. Tetapi, apabila responden telah gagal melakukannya, pengeluaran TOL dalam kes ini adalah sah dan efektif dan kesemua pihak adalah wajib memperakuinya. Oleh itu, TOL dan dua arahan yang dikeluarkan, iaitu arahan penutupan jalan dan arahan pembangunan mestilah dianggap kekal berkuat kuasa sehinggalah dibatalkan kesahannya oleh mahkamah perundangan. Selanjutnya, atas perkara ini, s 114(e) Akta Keterangan 1950, membuat anggapan bahawa, kesemua tindakan-tindakan rasmi adalah sah kecuali dibuktikan sebaliknya. Oleh itu, Mahkamah Rayuan di dalam memutuskan bahawa TOL bukan satu pembelaan kepada tuntutan responden di dalam kacau ganggu awam atau kemungkiran tanggungjawab statutori telah mengabaikan peraturan anggapan kesahan surat cara statutori atau arahan atau arahan pentadbiran kecuali dibatalkan atau diketepikan di dalam prosiding kehakiman yang dibawa untuk tujuan tersebut dan telah gagal untuk mempertimbangkan peruntukan KTN yang relevan di mana TOL dikeluarkan atau peruntukan statutori di mana arahan penutupan jalan dan arahan pembangunan telah dikeluarkan (lihat perenggan 112–113, 116 & 118).

(4) (oleh **Zaki Azmi Ketua Hakim Negara** dan **Aziz Mohamad HMP**) Seksyen 12 Akta tersebut tidak boleh dibaca sebagai mengenakan kewajipan untuk meneruskan mengekalkan jalan awam sebagai jalan awam tetapi menjaganya dengan baik. Seksyen 46(4) Akta tersebut memberikan kuasa kepada pihak berkuasa tempatan untuk membenarkan pembinaan sementara untuk tujuan keraian-keraian dan majlis-majlis dan bukannya untuk tujuan di mana LHH3 telah ditutup. Oleh itu, ss 12 dan 46 Akta tersebut tidak memberikan hak kepada pihak berkuasa tempatan untuk menutup LHH3 hanya kerana TOL di bawah s 65 KTN telah dikeluarkan (lihat perenggan 9–11).

(5) (oleh **Zulkefli HMP** menentang) Autoriti berkenaan dengan kerugian ekonomi tulen menunjukkan bahawa mahkamah mungkin tidak membenarkan tuntutan bagi kerugian ekonomi tulen kecuali tuntutan tersebut adalah berkenaan dengan satu jumlah yang pasti yang mana telah pun dibayar oleh perayu dan hanya jumlah tersebut sahaja perayu boleh memohon untuk mendapatkannya kembali. Selanjutnya, kes *Highland Towers* telah diputuskan sebahagian besarnya berdasarkan alasan awam, oleh itu tidak terdapat kerugian ekonomi boleh diperoleh semula terhadap pihak berkuasa tempatan. Dalam kes ini, dalam menentukan sama ada tuntutan untuk kerugian ekonomi boleh diperolehi semula daripada kemungkiran tanggungjawab statutori

seperti yang didakwa, adalah penting bagi mahkamah mengambilkira keseluruhan skim statut yang relevan. Berdasarkan mukadimah kepada Akta, tidak terdapat syor yang ianya bertujuan untuk menyediakan pampasan bagi kerugian kewangan seperti yang dipohon oleh responden. Terma-terma ss 12 dan 46 Akta tersebut menunjukkan bahawa ianya menghalang apa jua pembinaan yang mana-mana kemungkirannya akan mengakibatkan satu-satu pihak boleh menuntut kerugian kewangan yang timbul daripadanya. Oleh itu Mahkamah Rayuan adalah salah dalam memutuskan bahawa DBKL adalah bertanggungan bagi kerugian ekonomi dengan alasan kemungkiran tanggungjawab statutorinya seperti yang didakwa (lihat perenggan 141, 155 & 157).

(6) (oleh **Zaki Azmi Ketua Hakim Negara**) Responden tidak berhak kepada kerugian ekonomi tulen yang akibat daripada kemungkiran tanggungjawab statutori dan tort yang dilakukan oleh DBKL dan kerajaan. Tetapi, UDA adalah bertanggungan bagi kerugian ekonomi tulen terhadap responden dengan award kerugian tersebut adalah terhad kepada satu per tiga daripada jumlah keseluruhan kerugian ekonomi tulen (lihat perenggan 13–14).

(7) (oleh **Abdul Aziz Mohamad HMP**) Keputusan mahkamah di dalam kes *Highland Towers* atas persoalan kerugian ekonomi tulen adalah bahawa setiap kes perlu dipertimbangkan dengan pemakaian s 3(1) Akta Perundangan Sivil 1956, ke atas fakta dan keadaan tersendiri. Mahkamah tidak membuat keputusan menghalang satu-satu tuntutan untuk kerugian ekonomi tulen terhadap pihak berkuasa tempatan (lihat perenggan 54 & 80).]

Notes

For cases on nuisance, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 230–235.

For cases on public nuisance, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1576–1578.

Cases referred to

Allen v Gulf Oil Refining Ltd [1981] AC 1001, HL (refd)

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors [2003] 1 MLJ 567, CA (refd)

Boddington v British Transport Police [1999] 2 AC 143, HL (refd)

Caparo Industries Plc v Dickman [1990] 1 All ER 568; [1990] 2 AC 605, HL (refd)

Cutler v Wandsworth Stadium Ltd [1949] AC 398, HL (refd)

Department of Transport v North West Water Authority [1983] 3 All ER 273, HL (refd)

A *Department of Transport v North West Water Authority* [1983] 1 All ER 892, HL (refd)
Dr Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants [1997] 3 MLJ 546, HL (refd)
F Hoffmann La-Roche & Co AG and Ors v Secretary of State for Trade and
B *Industry* [1975] AC 295, HL (refd)
Hunter v Canary Wharf Ltd [1997] 2 All ER 426, HL (refd)
Karupannan v Balakrishnen (Chong Lee Chin & Ors, third parties) [1994] 3 MLJ 584, FC (refd)
Kerajaan Malaysia v Cheah Foong Chiew dan lain-lain [1993] 2 MLJ 439, HC
C (refd)
Koperasi Pasaraya (M) Bhd v UDA Holdings Sdn Bhd & Ors [2007] 2 MLJ 182, HC (refd)
London, Brighton South Coast Railway Co v Truman (1885) 11 App Cas 45 (refd)
D *Lord Mayor, Alderman and Citizens of the City of Manchester v Farnworth* [1930] AC 171, HL (not folld)
McGuire v Hastings District Council [2002] 2 NZLR 577, PC (refd)
Majlis Perbandaran Ampang Jaya v Stephen Phoa & Ors [2006] 2 MLJ 389, FC (refd)
E *Mohamed Said v Fatima* [1962] MLJ 328, HC (refd)
Murphy v Brentwood District Council [1990] 2 All ER 908, HL (refd)
Nepline Sdn Bhd v Jones Lang Wootton [1995] 1 AMR 451, HC (refd)
Penang Development Corp v Teoh Eng Huat & Anor [1993] 2 MLJ 97, SC (refd)
F *Pilba Trading & Agency v South East Asia Insurance Bhd & Anor* [1998] 2 MLJ 53, HC (refd)
Rowley & Ors v Secretary of State for Department of Works and Pensions [2007] 3 FCR 431, CA (refd)
G *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 7 MLJ 1; [2007] 6 CLJ 245, FC (refd)
Smith v East Elloe Rural District Council & Ors [1956] AC 736; [1956] 1 All ER 855, HL (refd)
St Elizabeth Home Society v Hamilton City [2005] OJ 5369, SC Ontario (refd)
H *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200, FC (refd)
Stovin v Wise, Norfolk County Council (Third Party) [1996] AC 923; [1996] 3 All ER 801, HL (refd)
Sutherland Shire Council v Heyman (1985) 60 ALR 1, HC (refd)
I *Syarikat Perniagaan United Aces Sdn Bhd v Majlis Perbandaran Petaling Jaya* [1997] 1 MLJ 394, FC (refd)
Tan Chye Choo & Ors v Chong Kew Moi [1970] 1 All ER 266, PC (refd)
Three Meade Street Ltd v Rotorua District Council [2005] 1 NZLR 504, HC (refd)

UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals [2007] 6 MLJ 530; [2007] 5 CLJ 489, CA (refd)
Vasiliou v Secretary of State for Transport [1991] 2 All ER 77, CA (refd)
Wentworth v Wiltshire County Council [1993] 2 All ER 256, CA (refd)

Legislation referred to

Civil Law Act 1956 s 3, 3(1)
Evidence Act 1950 s 114(e)
Federal Territory (Planning) Act 1982 s 22
Government Proceedings Act 1956 s 8
Highways (Miscellaneous) Provisions Act 1961 [UK]
Housing Developers Act 1966
Local Government Act 1965 s 65
National Land Code ss 40, 42(2), 44(1)(a), 65, 65(1), 65(2), 67(2), 67(3), 67(4), 418, Form 4A
Road Transport Act 1987 ss 67(a), 70, 70(1), 70(2)
Road Transport Regulation
Street, Drainage and Building Act 1974 ss 3, 4, 4(1), 4(1)(a), 4(1)(b), 4(1)(c), 4(1)(d), 5(c), 12, 12(1), 46, 46(1), 46(1)(a), 46(1)(c), 46(1)(d), 46(1)(e), 46(1)(f), 46(3)(a), 46(4), 48, 95(2), 95(3)

Appeals from: Civil Appeal Nos W-02–735 of 2006 (Court of Appeal, Putrajaya), W-02–653 of 2006 (Court of Appeal, Putrajaya) and W-01–79 of 2006 (Court of Appeal, Putrajaya)

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Zaki Azmi Chief Justice:

[1] I have read through the judgments of my learned brothers Abdul Aziz Mohamad FCJ and Zulkefli Ahmad Makinudin FCJ. I have decided to express my own opinion on this appeal. For that purpose however, I do not need to delve into the facts in detail. I also am not reciting all the relevant provisions of the legislations. I will as far as possible be using the same terms of reference as used in the two judgments. Wherever relevant, I am also relying on the authorities cited by them.

[2] The respondents in all the three appeals, ie Koperasi Pasaraya Malaysia Bhd, operated a supermarket along Jalan Haji Hussein Kuala Lumpur. Its customers used the entrance to the supermarket and the parking area used by its customers was located along Lorong Haji Hussein 3 ('LHH3'). Uda Holdings Bhd ('UDA'), the appellant in Rayuan Sivil 02–32 Tahun 2007(W) on the other hand owned a piece of land Lot 2347 in the vicinity over which they intended to construct two multi storey buildings. Unfortunately, on that Lot 2347 were a number of unlicenced hawkers. For social, economic as well as political reasons, these hawkers had to be relocated during the construction. Working with DBKL, UDA decided that they should be located on LHH3. LHH3 is also a thoroughfare. Apart from being used to access to the supermarket, customers also used that road for purposes of loading and unloading passengers and goods to their vehicles. Along LHH3 were 35 parking places. It is not wrong to presume that the customers of the respondent's supermarket would use these parking places to park when shopping at the supermarket. The respondent claimed by the closure of LHH3, they lost a substantial number of their customers.

[3] UDA working together with DBKL and the government sought a way to overcome this problem according to the laws as they had interpreted them. So what the two parties ie DBKL and the Government of Malaysia did to accommodate UDA was this. LHH3 was a public street. The land on which the road was located was no doubt state land. In order to utilise that area for the purpose of relocating the hawkers, they can then take steps to close the road. Once it was closed, it would then become a vacant piece of land. Only then could TOL (temporary occupation licence) be given to UDA over the land. However, as can be seen, this was not what happened in this case (see p 5 below).

[4] I totally agree with the conclusion of the learned trial judge that this could not have been done without the three parties working in concert. In my view these acts of closing LHH3, declaring its closure and thereafter UDA applying for the TOL would have all been in order. The government invoked s 70 of the Road Transport Act 1987 ('RTA') to close LHH3 to the traffic. DBKL has no rights of ownership over a public road such as LHH3. With its closure, the road would have become just an empty piece of land. Upon application by UDA made to the Land Administrator Kuala Lumpur (*Pentadbir Tanah Kuala Lumpur*), a TOL was issued to UDA. All these are fine if no damage was done to anybody. But by doing so, as mentioned above, the respondent's supermarket business had been severely affected financially. Such closure had been detrimental to the business of the respondent's supermarket.

[5] The relevant provisions of the laws had to be complied with by DBKL and the Government of Malaysia. However, I noticed from the dates the road was first closed and the issue of the first TOL seems not to be in order. The TOL was issued on 9 September 1996 to be effective from 10 August 1996. Note that it was to run retrospectively. The TOL was subsequently extended from time to time on 2 December 1996, 13 May 1998, 28 June 1999 and 2 July 2001. It was only after the TOL was issued that DBKL after consultation with the Director General of Road Transport by notice issued in the *Gazette* dated 8 May 1997 proposed that LHH3 to be closed to traffic from 22 May 1997 to 31 July 1999. In other words the TOL was issued while LHH3 was still a public road.

[6] The respondent did not object to the proposal of DBKL to close the road. By PU (A) 311/97, the road was closed. The notice of the development order was dated 29 August 1996, ie even before the road was closed. Properly, the road should have been first closed and the notice for TOL issued before the development order could be issued. The development order was for proposal to build 76 units of temporary stalls. This was where the problem arose because the TOL was issued over LHH3 even before the road was closed to traffic. The nett effect of this was that TOL over LHH3 was granted by the administrator even before the road ceased to become a public road. It would seem that because of the TOL granted to UDA, DBKL became obligated to close the road.

[7] It was for this reason that the question posed before us was whether LHH3 had to be closed pursuant to the issuance of the TOL because with its closure it ceases to become a public street. The consequential question that arises is whether DBKL had rightly closed LHH3.

[8] I totally agree with my learned brother Aziz Mohamad FCJ that the grant of TOL to UDA cannot be read as imposing an obligation upon DBKL to close LHH3 pursuant to s 46. Must the road be closed because TOL was issued to someone? To me, issuance of TOL and the closing of the road are two separate independent acts. Although not raised in this appeal, I wonder whether it was proper for TOL to be issued in respect of a public street and the street was closed to allow TOL to be issued over that land.

[9] Section 12 of the Street, Drainage and Building Act 1974 (Act 133) provides that once a road is declared public street, the local authority is obligated to maintain it. That section is not to be read as imposing an obligation to continue to keep a public street as a public street but rather to keep the street under repair.

[10] The TOL was issued for the purpose of constructing stalls for the hawkers. In my view, it cannot impose an obligation on DBKL and the government to allow UDA to use the land to achieve its objective. The discretion as to whether to close LHH3 and convert it into a shopping area must be considered on a different basis altogether. Section 46 of Act 133 makes it an offence to do the acts listed in the section. The purpose I believe is to prevent obstructions being erected in a public place. In my opinion, LHH3 is a public place for the purpose of s 46. Subsection (4) of that section empowers the local authority to allow temporary erections for purposes of festivals and ceremonies, not for the purpose for which LHH3 was in fact closed. LHH3 was closed to traffic and subsequently development order was granted by DBKL for UDA to achieve its objective. To me this is clearly wrong.

[11] My answer to the third question is therefore that ss 12 and 46 of Act 133 do not confer a right to the local authority to close LHH3 just because TOL under s 65 of the National Land Code had been issued in respect thereof. In other words, the question is answered in the negative.

[12] Consequently if the road had wrongly been closed because the TOL was issued, then the first question must be answered in the negative.

[13] On the second question regarding pure economic loss, I totally agree with the reasoning of my learned brother Zulkefli FCJ and hold that that question be answered in the positive. In short, the respondent is not entitled to pure economic loss resulting from breach of statutory duty and tort committed by DBKL (appellant in 02–33 of 2007(W)) and the Government of Malaysia (the appellant in 01–9 of 2007(W)). The question does not refer to UDA Holdings Sdn Bhd.

[14] UDA Holdings Sdn Bhd is therefore liable for pure economic loss against the respondent but the award of such loss is limited to only one-third of the total pure economic loss.

[15] The net effect of our three judgments is that the appeal in respect of Rayuan Sivil No 02–32 of 2007(W) (UDA Holdings) is dismissed but as regards pure economic loss, UDA is liable to only one-third of total economic loss. In respect of Rayuan Sivil No 02–33 of 2007(W) (DBKL) and Rayuan Sivil No 01–9 of 2007(W) (the government), the appeals are also dismissed except that DBKL and the government are not liable for pure economic loss suffered.

[16] Costs is awarded to the respondents in all three appeals.

[17] Deposits to the respondent towards costs.

POST SCRIPT

[18] The respondent was also to some extent to be blamed for the losses that he suffered by not responding to the *Gazette* notification No 3775 published on 8 May 1997 issued by DBKL pursuant to s 70 of the RTA. The notice was issued calling for objections against the intended closure to traffic of LHH3. It also did not take any action as soon as they became aware that LHH3 was going to be used for relocating the hawkers. Had it taken these actions from the beginning, it may have been able to prevent damage occurring to its business.

Abdul Aziz Mohamad FCJ:

[19] Koperasi Pasaraya Malaysia Bhd ('Kopasar') brought a claim in the High Court against UDA Holdings Sdn Bhd ('UDA'), the Dato' Bandar Kuala Lumpur ('DBKL') and the Government of Malaysia ('the government') for damages on account of losses said to have been sustained by its supermarket, which was located at the junction of Jalan Haji Hussein, Kuala Lumpur, and Lorong Haji Hussein 3 ('LHH3'), as a result of the closure by DBKL of a section of LHH3 to enable UDA to construct on that section of LHH3 a temporary building comprising 76 stalls, for which the government had issued to UDA a temporary occupation licence ('TOL') over that section of LHH3. The stalls were for the temporary relocation of unlicensed hawkers from UDA's land at Lorong Haji Hussein to enable UDA to construct a multi-storey building on the land. I shall from now, for convenience, be referring to the section of LHH3 that was closed simply as LHH3, which will also, where the context requires, which will be rarely, refer to the entire street, which was a public street. The closure of LHH3 lasted five years, from 28 October 1996 to 30 November 2001. Kopasar succeeded in the High Court. The Court of Appeal affirmed the High Court's decision as regards liability and, by a majority, as regards quantum, and ordered UDA, DBKL and the government to bear the damages equally. Their separate appeals to this court were heard together.

[20] I need to set out, at least for now, only the following facts. On 29 August 1996, by a Development Order issued under s 22 of the Federal Territory (Planning) Act 1982, DBKL gave to UDA planning permission for the construction of the temporary stall-building on LHH3.

[21] The TOL was issued by the land administrator, Kuala Lumpur, an officer of the government, to UDA on 9 September 1996 under s 65 of the National Land Code. It stated that LHH3 was state land. The purpose of the occupation that it licensed was stated to be as a site for stalls for the location of hawkers. One of the conditions to which it was subject was that the land whose temporary occupation it licensed may only be developed for the purpose of a site for temporary stalls ('*hanya boleh dimajukan untuk maksud tapak gerai jenis sementara sahaja*'). According to the High Court and the Court of Appeal, the TOL was issued on the application of UDA and DBKL.

[22] To legalise the closure of LHH3, DBKL, after consultation with the Director General of Road Transport, made an order under s 70(1) of the Road Transport Act 1987, namely, the Road Transport (Prohibition of Use of Road) (City of Kuala Lumpur) (No 6) Order 1997, which was gazetted on 14 August 1997, prohibiting the driving of vehicles on LHH3 for the period from 14 August 1997 until 31 July 1999.

[23] Kopasar instituted its action in 1997, after the said order was gazetted.

[24] The learned trial judge (Azmel J later FCJ) found that the closure of LHH3 was the joint action of UDA, DBKL and the government, that it caused a public nuisance, especially to Kopasar, and that the collapse of its supermarket business was entirely due to the closure. The liability that the learned trial judge found against the three defendants was liability for public nuisance. Azmel J's judgment that I make my reference is *Koperasi Pasaraya (M) Bhd v UDA Holdings Sdn Bhd & Ors* [2007] 2 MLJ 182.

[25] The Court of Appeal (James Foong, Low Hop Bing, Suriyadi Halim Omar JJCA) unanimously agreed with Azmel J's finding of liability for public nuisance against the three defendants. In addition they also found DBKL liable for breaches of statutory duty by contravening ss 12 and 46 of the Street, Drainage and Building Act 1974 ('Act 133') and that the eventual collapse of Kopasar's supermarket business was consequent upon those breaches by DBKL. There was no finding by the Court of Appeal of breach of statutory duty on the part of the government, except by James Foong JCA alone. The Court of Appeal's judgment that I make my reference is *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals* [2007] 6 MLJ 530; [2007] 5 CLJ 489.

[26] The finding of the Court of Appeal of breaches of statutory duty on the part of DBKL gave rise to one of the three questions on which leave to appeal to this court was granted. The question is:

Whether the provisions of ss 12 and 46 of (Act 133) confer a right of action against a local authority in respect of a road closure undertaking (undertaken?) pursuant to an issuance of a (TOL) under s 65 of the National Land Code?

I will now deal with this question.

THE QUESTION OF SS 12 AND 46 OF ACT 133

Section 12

[27] Section 12, by its sub-s (1), enables qualified frontagers of a private street or part of a private street which is not less than forty feet wide and in respect of which street works have been executed to the satisfaction of the local authority, to demand that the private street or part be declared a public street, and thereupon 'the local authority shall declare the same to be a public street and such street shall thereupon become a public street and forever afterwards be maintained by the local authority'. The matters provided for by s 12 are matters that could only take place after the coming into operation of Act 133.

[28] The Court of Appeal held that, by closing LHH3, DBKL had failed in its duty to maintain LHH3 under sub-s (1) of s 12, that the breach of statutory duty caused the collapse of the business of Kopasar's supermarket, and that although s 12 does not impose a civil remedy for its breach, 'there is a presumption that (Kopasar) as the party injured thereby will have the right of action'.

[29] In my opinion the Court of Appeal erred in holding that in closing LHH3 DBKL was in breach of its statutory duty under s 12 to maintain it. In the first place, s 12 is not concerned with just any public street. It is concerned only with a street that was originally a private street but was, after the coming into operation of Act 133, declared to be a public street under the section's sub-s (1). Not all public streets in the area of a local authority are such upgraded public streets. From the definition of 'public street' in s 3 of Act 133 it may be seen that streets which were 'usually repaired or maintained by the local authority before the coming into operation of this Act' are also public streets. Therefore in order to come to the conclusion that under s 12 DBKL had a statutory duty to maintain LHH3, the Court of Appeal would have needed first to make a finding that LHH3 was a private street that had been upgraded to a public street under s 12 after the coming into operation of Act 133. They made no such finding.

[30] In the second place, even if LHH3 was such an upgraded public street, s 12 is not a provision that is intended to impose a statutory duty on a local authority to maintain public streets. If at all there is such a statutory duty it

must be found elsewhere than in s 12. It cannot be that the statutory duty to maintain exists only in respect of public streets upgraded under s 12, but does not exist in respect of other public streets. There must be a provision in Act 133 for the maintenance of all public streets. There is such a provision. It is sub-s (1) of s 4, which provides as follows:

> 4(1) The local authority shall, so far as the funds at its disposal will admit, cause all public streets together with the footways thereof, whether covered by arcades or not, to be maintained and repaired and may —
>
> (a) cause the same to be paved, metalled, flagged, channelled, drained, kerbed, lighted or otherwise improved, and the surface thereof to be raised, lowered or altered as it thinks fit;
>
> (b) make and keep in repair any footways for the use of foot passengers in any such street;
>
> (c) place on the sides of such footways or otherwise such fences and posts as are needed for the protection of foot passengers;
>
> (d) provide street lighting.

Section 12, when it says that 'such street shall … forever afterwards be maintained by the local authority' is in my opinion intended to emphasise the consequence, as regards maintenance, of the upgrading so that there could be no question whatever that the maintenance of the street will always be the responsibility of the local authority. But the responsibility is under s 4, and it is that section that must be looked to for the local authority's statutory duty to maintain public streets. Since s 4 applies to all public streets, including those upgraded under s 12, the emphasis of s 12 as regards the maintenance of such public streets is really not necessary. Even without the emphasis, s 4 will apply to all public streets so long as they exist, until the law is changed.

[31] So then I come to the crux of the question, namely, whether DBKL, in closing LHH3, was in breach of its statutory duty under s 4. There can be no doubt that the section imposes on DBKL a statutory duty to maintain public streets 'so far as the funds at (his) disposal will admit'. The duty is to 'cause all public streets … to be maintained and repaired'. The matters specifically listed in paras (a), (b), (c) and (d) of sub-s 1 are matters that the local authority 'may' do and are, therefore, not set out as items of duty. The duty that the section imposes is only the duty to maintain and repair.

[32] I am of opinion that the duty of a local authority under sub-s (1) of s 4 to maintain a public street is simply to do what *The Concise Oxford Dictionary* (9th Ed) gives as meaning number 4 of the word 'maintain', that is to say, to 'preserve or provide for the preservation of (a … road …) in good repair'. It is a duty to ensure that the public street is kept in good repair. It

is not a duty to ensure that the public street always exists or is always available for use. It is not a duty to ensure that it is not closed. It is a duty to ensure that as long as the public street exists and is available for use, it is kept in good repair. The duty to maintain a public street is not to ensure its continued use but to ensure that, when used, it may be used with comfort and safety. The closure of the public street by a local authority may be open to question as to its propriety or legality, but nowise, in my opinion, can it be said that the closure of a public street constitutes a failure to maintain it and a breach of the duty to maintain it under the subsection.

Section 46

[33] I now turn to s 46 of Act 133. It creates the offence of causing an obstruction. I reproduce only sub-s (1), (3)(a), and (4):

46(1) Any person who

(a) builds, erects, sets up or maintains or permits to be built, erected or set up or maintained any wall, fence, rail, post or any accumulation of any substance, or other obstruction, in any public place;

(b) without the prior written permission of the local authority covers over or obstructs any open drain or aqueduct along the side of any street;

(c) deposits or causes to be deposited any box, bale or package or merchandise, utensils, crockery, or other article or thing in any public place for a longer time than is necessary for loading or unloading such merchandise or article;

(d) deposits or causes to be deposited any goods, article or thing used for or in connection with his trade in any public place;

(e) deposits or causes to be deposited timber, scrap iron, derelict vehicles or any part thereof, waste materials or other article or thing in any public place;

(f) deposits or causes to be deposited garden refuse, kitchen refuse or trade refuse or any other article or thing in any public place; or

(g) causes or allows any vehicle to rest on any footway, shall be guilty of causing an obstruction and may be arrested without warrant by any police officer or any officer or employee of the local authority authorized in writing in that behalf by the local authority and taken before a Magistrate's Court and shall be liable on conviction to a fine not exceeding five hundred ringgit, and in the case of a second or subsequent conviction to a fine not exceeding one thousand ringgit.

> (3)(a) The local authority may cause any such obstruction to be removed or may itself through its servants remove the same to a suitable place, there to remain at the risk of the owner or person offending and may detain the same until the expenses of removal and detention are paid.
>
> (4) Nothing herein shall prevent the local authority from allowing any temporary erections in any public place or the temporary use of any part of a public place on occasions of festivals and ceremonies.

Of sub-s 1, the Court of Appeal directed their attention only to para (a), which applies only 'in any public place', as do also paragraphs (c), (d), (e) and (f). Section 48 defines 'public place' as follows:

> 'public place' means any street, park, garden, promenade, fountain, traffic island or circus, playground, river bank, whether above or below high water mark, place of a [sic] public resort or any place to which the public has access.

It includes a 'place of a public resort or any place to which the public has access'. A 'place to which the public has access' is not defined in the Act but 'a place of public resort' is defined in s 3 as follows:

> 'a place of public resort' means a building, or a defined or enclosed place used or constructed or adapted to be used either ordinarily or occasionally as a church, chapel, mosque, temple or other place where public worship is or religious ceremonies are performed, not being merely a dwelling house so used, or as a cinema, theatre, public hall, public concert room, public ballroom, public lecture room, or pubic exhibition room, restaurant, night club, terminus, or shopping arcade, or as a public place of assembly for persons admitted thereto by ticket or otherwise, or used or constructed or adapted to be used either ordinarily or occasionally for any other public purpose.

[34] According to the Court of Appeal, Kopasar had submitted that DBKL had 'failed to remove the obstruction, and instead allowed the road to be barricaded'. The Court of Appeal, while recognising that sub-s (3)(a) of s 46 is worded as a power to remove obstructions, were of the view that the power is 'coupled with a duty to effect the removal thereof' and accordingly held that the failure on the part of DBKL to exercise his power under sub-s (3)(a) to remove the obstruction was a breach of his statutory duty, which caused the eventual collapse of the business of the supermarket. As was the case as regards the alleged breach of s 12, the Court of Appeal also held that although s 46 does not impose a civil remedy for its breach, 'there is a presumption that (Kopasar) as the party injured thereby will have the right of action'.

[35] The Court of Appeal did not specify what constituted the obstruction. The closest that they got to specifying the obstruction is in the following words, spoken when dealing with the question of failure to maintain LHH3: '… DBKL's failure to maintain the Road as a public street is clearly

demonstrated by DBKL's barricade to the road and allowing UDA to erect the 76 stalls thereon. The result of the barricade is the obstruction caused by DBKL to the Road.' It is clear, however, from the written submission of DBKL's counsel, that DBKL understands the obstruction intended by the Court of Appeal to be the building comprising the 76 stalls. I will accept that as a correct understanding.

[36] The facts that have been set out show that the actual closure of LHH3 took place after UDA was given the TOL to occupy LHH3 although the closure under the Road Transport Act 1987 commenced later. UDA would have commenced construction of the stall-building only after obtaining the TOL and after the actual closure of LHH3. When UDA constructed the building on LHH3, for which DBKL gave planning permission and other approvals, LHH3 was virtually its land. The proposition that DBKL should have removed the building, which is founded on paras (a) of sub-s (1) of s 46, and on sub-s (3)(a), involves the proposition that in erecting the building on land over which it had a TOL, UDA was erecting an obstruction in a public place.

[37] I would have expected that the first and foremost question to be answered is whether LHH3, after UDA became its occupier or 'land-owner' by virtue of the TOL and after it was closed, was a public place. It was UDA's temporary domain under the land law. Was it a public place? It is important to recognise that the question of public place has to concern the land, not the stall-building, because the building was the thing that is said to be the obstruction that was built or erected in a public place. Going by the definition of 'public place' in s 48, the only available argument is that the land was a 'place to which the public has access', which expression is not defined. It was not a 'street', because LHH3 had been closed and had become UDA's TOL land. It would not qualify as 'a place of public resort' as defined in s 3. So the question would be, was UDA's TOL land a 'place to which the public has access?' That question was not considered by the Court of Appeal because, I suppose, it was not addressed there, as it was not addressed before us. Therefore I will not attempt an answer beyond what I have already said.

[38] Even if UDA's TOL land were construed as a public place, sub-s (4) of s 46 might bring the stall-building out of s 46 if it was erected on an occasion of a festival or ceremony, but it was not. But in my opinion erecting the stall-building on the TOL land cannot be what is intended by para (a) of sub-s (1) of s 46 to be an act of causing an obstruction. The erection of the building was with the approval of DBKL. As far as concerns s 46, the case is no different from that of a person who obtained a TOL in respect of some other State land in Kuala Lumpur and built on it a temporary shop with the approval of DBKL. It is ludicrous to suggest that he thereby built or erected

an obstruction in a public place and committed an offence under para (a) of sub-s (1) of s 46, and that DBKL, who approved the construction of the building, had a duty under sub-s (3)(a) to remove it. The situation is simply not of the kind intended by s 46.

[39] In my judgment, for the reasons that I have given, there is no case of breach of statutory duty on the part of DBKL under s 12 or 46, or even under s 4, of Act 133. I would therefore answer the leave-question about ss 12 and 46 in the negative.

The question of the TOL

[40] As I said, the Court of Appeal upheld the High Court's finding of liability for public nuisance against UDA, DBKL and the government. Pertinent to that finding is another of the three questions on which leave to appeal to this court was granted:

> Whether an act done pursuant to a (TOL) resulting in the closure of a public road is a defence to a claim for public nuisance and/or breach of statutory duty?

Since the effective finding of the Court of Appeal as regards breach of statutory duty was against DBKL only and since in my judgment there is no case of breach of statutory duty against DBKL, I would remove the mention of 'breach of statutory duty' from the question.

[41] The question posed is about the TOL. Azmel J dealt with the matter of the TOL in his judgment. I gather from the judgment that at the beginning, in February 2000, when the remedy that Kopasar sought was the demolition of the stall-building and the reopening of LHH3, he made two rulings, which he said were in respect of two preliminary issues and 'were based purely on procedure', namely, that the TOL was valid and that Kopasar had failed to comply with s 8 of the Government Proceedings Act 1956; and with the latter ruling he struck out the action. The Court of Appeal reversed both rulings and ordered that the hearing of the action be proceeded with. By the time of the continued hearing, the building had been demolished and LHH3 had been reopened and Kopasar had changed the remedy that it sought to one of damages. Because of that change of circumstances Azmel J said that he was 'inclined to think that the validity of the TOL is a non-issue'. He nevertheless proceeded to consider the validity of the TOL and concluded that the TOL was invalidly issued. One reason for the conclusion seems from para (18) of the judgment to be because it resulted in the public nuisance that he found. Another reason seems to be in the following words in para (13):

> I have not come across any case where any authority had ever issued TOL on any public road that is heavily used by the public for the benefit of a handful unlawful traders. To my knowledge TOL is issued on government land where it is not

> occupied or unlawfully occupied by someone. While it is true that the authority has the power to issue TOL on any land it cannot do so without reasonable justification. There is no legitimate justification in this case. The action would be unreasonable if it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it (see *Associated Provincial Picture Houses Ltd v Wednesbury Core* [1948] 1 KB 223).

[42] The Court of Appeal, as may be seen in para (60) of their judgment, declined to consider the question of validity of the TOL, holding that Azmel J's view that the TOL was invalid was merely an obiter dictum, because he had specifically found that the validity of the TOL was a non-issue.

[43] The Court of Appeal, however, as may be seen in paras (92), (95) and (98) of their judgment, proceeded to consider the issuance of the TOL as the common defence of the three defendants and held that the TOL did not provide them with a licence or defence to cause, create or bring about a public nuisance. The Court of Appeal further held that the learned trial judge was right in rejecting the defence based on the issuance of the TOL, although I find it difficult to see from the judgment of Azmel J that he was dealing with the question of the TOL as a defence.

[44] The leave-question about the TOL appertains to the finding of the Court of Appeal concerning the TOL as a defence. It is not about the validity of the TOL but is about the TOL as a defence, on the basis that it was valid.

[45] The leading submission on this question, and the only one that I need to deal with, is that of DBKL's counsel, whose argument is twofold. First, reliance is placed on two of the four propositions in which Webster J in *Department of Transport v North West Water Authority* [1983] 1 All ER 892, at p 895, summarised 'the common law rules which govern the liability for nuisance of bodies exercising statutory authority', and which the House of Lords, in *Department of Transport v North West Water Authority* [1983] 3 All ER 273, at p 275, said were a correct summary. It is submitted that the two propositions would apply to excuse DBKL from liability for nuisance.

[46] One proposition relied on, the first of the four, is as follows:

> (1) In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a duty imposed on it by statute …

Relying on that proposition, it is argued that DBKL was under a statutory duty under sub-s (2) of s 67 of the National Land Code to recognise and act on the TOL since it was over a road within his authority. Subsection (2) provides as follows:

A (2) Every [TOL] shall have effect subject to such provisions as may be contained therein and, so far as not inconsistent therewith, to any other provisions as may be prescribed.

The words 'shall have effect' are the particular words relied on as imposing on
B DBKL a statutory duty.

[47] In my judgment the purpose of sub-s (2) is to subject the holder of a TOL to the provisions contained in it and to other prescribed provisions. It imposes no statutory duty on DBKL or anyone else to do anything. The
C words 'shall have effect' do not equal to 'shall be given effect to'. What the subsection has is not an imperative 'shall', one of command, but a 'shall' declaratory of an inescapable legal fact that could as effectively be established, were it the style, by the words 'has effect'.

D **[48]** The other proposition relied on, the third of the four, is as follows:

3 In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a power conferred by statute if, by statute, it is not expressly either made liable, or not exempted from liability, for nuisance …

E
Relying on that submission, it is argued that, in consequence of the issuance of the TOL, DBKL was obliged to exercise his statutory powers under the Road Transport Act 1967 to close LHH3 and under the Federal Territory (Planning) Act 1982 to consider issuing the development order, as otherwise
F the stall-building could not be constructed and the TOL would then be rendered useless or ineffective or become frustrated.

[49] In my judgment, there was, in law, no duty or obligation on DBKL to ensure that the TOL achieved its purpose. DBKL exercised his statutory
G powers under the road transport and planning statutes pursuant to what must have been an understanding with UDA and the government that the hawkers on UDA's land be temporarily located on LHH3. As Azmel J said, UDA, DBKL and the government were acting in concert. Had that not been the case, DBKL would have been perfectly entitled in law to refuse to close
H LHH3 and to refuse to allow the stall-building to be built on it. Had that not been the case, a TOL would not have been issued over a public street.

[50] Secondly, reliance is placed on the following statement in Viscount Dunedin's speech in *Lord Mayor, Aldermen and Citizens of the City of*
I *Manchester v Farnworth* [1930] AC 171, at p 183:

When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making, or doing so authorised.

Seeking to apply that statement to the present case, DBKL argues that since the issuance of the TOL over LHH3 led to 'the inevitable result' of its closure, which DBKL says is in reality the complaint in this case, the closure being regarded as constituting the public nuisance of obstruction of traffic, the TOL was a statutory defence to the claim in public nuisance.

[51] In my judgment the statement is inapplicable in this case because the issuance of the TOL over LHH3 was not authorised by Parliament and because, for the reasons that I stated just now, the closure of LHH3 was not the inevitable result of the issuance of the TOL.

[52] My answer to the leave-question about the TOL is therefore in the negative. Thus far, then, as my judgment goes, the findings of the High Court and the Court of Appeal of liability for public nuisance on the part of UDA, DBKL and the government hold good.

The question of pure economic loss

[53] The only remaining leave-question to be answered is the following:

> Whether the judgment of the Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 precludes a claim for pure economic loss against a local authority and/or Government of Malaysia.

I will refer to the litigation that culminated in the said judgment of this court as 'the *Highland Towers* case'.

[54] In the High Court in the present case, the judgment of this court in the *Highland Towers* case was brought to the attention of Azmel J by DBKL in an attempt to persuade him not to order DBKL to pay anything to Kopasar 'for fear that (DBKL) may go bust'. Azmel J decided against DBKL on the question on the grounds that in the *Highland Towers* case the cause of action was negligence whereas in the present case it was nuisance and that the financial standing of DBKL could not be equated with that of the local authority in the *Highland Towers* case, the Majlis Perbandaran Ampang Jaya ('MPAJ'). The Court of Appeal in the present case were of the view that DBKL could rely on the decision of this court in the *Highland Towers* case to escape from liability for pure economic loss arising only from negligence and nuisance but not from breaches of statutory duties, which the Court of Appeal had found DBKL to be guilty of but in my judgment he was not.

[55] I will say at once that the question does not concern UDA and that there is nothing in the judgment of this court in that case that provides a basis for suggesting that it precludes a claim for pure economic loss against the government. Therefore, I have to consider the question only as regards a local

A authority, which DBKL is, and even if the question were to be given a positive answer, the answer would not benefit UDA and the government, who would, therefore, remain liable in damages to the plaintiffs on the findings of the High Court and the Court of Appeal of liability for public nuisance. I will further right now say that the question is so framed that it requires us to
B examine only the effect of the judgment of this court in that case as regards a claim for pure economic loss against a local authority. It does not require us to decide on our own, afresh as it were, whether a claim for pure economic loss is available against a local authority. What we have to decide is whether the judgment of this court in the *Highland Towers* case can be read as meaning
C that by it this court has made a ruling for the present and other cases to come that a claim for pure economic loss cannot be allowed against a local authority. If it can be so read, then DBKL will not be liable for Kopasar's claim in this case. If it cannot be so read, DBKL will be liable.

D

[56] The report of the High Court judgment in the *Highland Towers* case that I make my reference is *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200. That of the Court of Appeal judgment is *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors*
E [2003] 1 MLJ 567. To show how the question of pure economic loss arose and was decided in the case, I do not find that I need to be very particular about the facts, which I, therefore, will set out as summarily as possible and as gleaned mainly from the Court of Appeal judgment, which was delivered by Gopal Sri Ram JCA.

F

[57] There were three tower blocks of apartments, called Blocks 1, 2 and 3, that stood in fairly close proximity to each other. Block 1 collapsed. The residents of Blocks 2 and 3, which remained intact, brought an action, principally in negligence and nuisance, against ten defendants. One of them,
G the fourth defendant, was MPAJ, the local authority concerned. According to the Court of Appeal (pp 584I and 585A), the claim of the plaintiffs was in substance one for pure economic loss because the essence of their case was that 'in consequence of the collapse of Block 1, the value of their apartments fell to such an extent that these are really worthless'.

H

[58] At the High Court, James Foong J (now JCA) found that Block 1 was brought down by a landslide, that is, a slope failure of a rather steep hill directly behind the three blocks. According to the Court of Appeal (p 582E), James Foong J found water emanating from the land of the fifth defendant,
I Arab Malaysian Finance Bhd, which was on the slope behind the three blocks, to be the major cause of the landslide. As regards MPAJ, James Foong J found that it owed a pre-collapse duty of care to the plaintiffs, which it breached, to do certain things, one of which was 'to ensure that the hill slope and the drainage thereon were properly accommodated before

approving building and other related plans, and during construction stage, to comply with and to ensure the implementation of drainage system' (p 252H-I), and therefore was negligent, but he found that s 95(2) of Act 133 protected MPAJ from claims for such acts of negligence. James Foong J also found that, post-collapse, the MPAJ also breached its duty of care to the plaintiffs 'to attend to the drainage problem after the tragedy' (p 257B) by 'not even fulfilling its obligation towards maintenance of the East Stream' (p 259C), which was a stream which flowed down the hill, and that MPAJ's negligence in this, post-collapse, aspect was not exempted from claim by the said s 95(2). James Foong J therefore found MPAJ liable for post-collapse negligence, that is to say, for breach of its duty of care to the residents of Blocks 2 and 3 occurring after the collapse of Block 1.

[59] The learned judge also found that MPAJ was liable for nuisance for being 'an unreasonable user of its land in failing to maintain the East Stream post collapse which is under its care' (p 259 F). It was a finding of post-collapse liability in nuisance. MPAJ's liability as found by the High Court was, therefore, post-collapse liability in negligence and nuisance.

[60] Besides MPAJ, six other defendants were found liable to the plaintiffs for their respective acts or omissions. James Foong J found the seven defendants were joint-tortfeasors causing the same damage to the plaintiffs, and ordered contribution, MPAJ's contribution being 15%.

[61] A common defence of the defendants was that the claim of the plaintiffs could not be maintained because it was a claim for pure economic loss. James Foong J relying on his own decision in *Dr Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants* [1997] 3 MLJ 546, that a claim for pure economic loss can be entertained in an action for negligence, rejected the defence.

[62] Of the seven defendants found liable, four, including MPAJ, appealed to the Court of Appeal. As regards MPAJ, the plaintiffs cross-appealed against James Foong J's granting to it of indemnity under s 95(2) of Act 133 in respect of pre-collapse negligence. The outcome of the appeal and cross-appeal involving MPAJ was that, as regards pre-collapse negligence, the Court of Appeal set aside the indemnity, so that MPAJ became liable to the plaintiffs for pre-collapse negligence, and as regards post-collapse liability, the judgment was set aside on the ground that a duty on MPAJ to act in a particular manner towards the property of the plaintiffs, assuming such a duty existed, should not have been enforced in private law proceedings but should have been enforced by way of judicial review.

[63] MPAJ appealed to this court against the decision of the Court of Appeal that it was liable for pre-collapse negligence and the plaintiffs appealed against the setting aside by the Court of Appeal of the judgment of the High Court as regards post-collapse liability. This court (Steve Shim CJSS, Abdul Hamid Mohamad FCJ (now CJ), Arifin Zakaria FCJ) unanimously decided in favour of MPAJ on the s 95(2) question as regards pre-collapse negligence and in favour of the plaintiffs on the question of post-collapse liability, holding that the Court of Appeal erred in holding that the plaintiffs' only recourse against MPAJ lay in the area of public law by way of judicial review. Therefore, were it not for this court's decision on the question of pure economic loss, the plaintiffs' position would have been as it was in the High Court, that is to say, they would have succeeded in establishing post-collapse liability in negligence and nuisance against MPAJ. But on the question of pure economic loss, the panel was divided. The question, being one of the questions on which MPAJ was granted leave to appeal to this court, was: 'whether pure economic loss is recoverable under our Malaysian jurisprudence with reference to (a) negligence and (b) nuisance'. While Steve Shim CJSS decided the question in favour of the plaintiffs, Abdul Hamid Mohamad FCJ, who wrote the judgment on the question, decided against, and Arifin Zakaria FCJ agreed with him. In the result, by a majority, MPAJ's appeal was allowed and the plaintiffs' cross-appeal was dismissed, so that MPAJ entirely escaped from liability.

[64] Let me go back and see how the Court of Appeal dealt with the question of pure economic loss. It was dealt with under the heading *Remoteness of damage* and as concerning the law of negligence. Gopal Sri Ram JCA said at p 585E:

> Applying the guidance provided in the foregoing authorities, it is our judgment, that it is not the nature of the damage in itself, whether physical or pure financial loss, that is determinative of remoteness. The critical question is whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which a plaintiff claims to have sustained, whether it be pure economic loss or injury to person or property.

[65] Of the 'foregoing authorities', the last that the Court of Appeal considered was *Murphy v Brentwood District Council* [1990] 2 All ER 908, from which the following passage, at p 933, from the speech of Lord Oliver of Aylmerton was quoted:

> The critical question, as was pointed out in the analysis of Brennan J in his judgment in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, is not the nature of the damage in itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained (see *Caparo Industries Plc v Dickman* [1990] 1 All ER 568; [1990] 2 WLR 358). The essential question which

has to be asked in every case, given that damage which is the essential ingredient of the action has occurred, is whether the relationship between the plaintiff and the defendant is such, or, to use the favoured expression, whether it is of sufficient 'proximity', that it imposes on the latter a duty to take care to avoid or prevent that loss which has in fact been sustained ...

[66] The Court of Appeal went on to say that in ruling on the question of pure economic loss, James Foong J should have asked himself, which he did not, the question whether pure economic loss to the plaintiffs was reasonably foreseeable by the defendants, but instead 'held that as a matter of policy he could award pure economic loss', which the Court of Appeal said was wrong, therefore overruling the decision in the *Dr Abdul Hamid Abdul Rashid* case that James Foong J relied on. The Court of Appeal then concluded (pp 585I and 586A–B):

But that is not the end of the matter. The question is whether the plaintiffs are entitled to succeed nevertheless. In the instant case, it is clear from the facts as found by the trial judge (for which there is more than sufficient evidential backing) that it was within the reasonable foresight of the defendants before us that in the event of a landslide, *some* economic loss would ensue to the plaintiffs. Indeed, when his judgment is read as a whole it is evident that the judge had concluded that pure financial loss to the plaintiffs was reasonably foreseeable by the instant defendants. In our judgment it is more than a mere probability that property that is affected by a landslide occasioned by the negligence of the defendants before us will be worthless or worth far less than property that is not so affected.

There you have it. On the peculiar facts of this case, the *kind of harm* suffered by the plaintiffs was reasonably foreseeable. The defendants are therefore liable to the full extent of it. And that extent is the loss in value of their apartments in Blocks 2 and 3 in consequence of the collapse of Block 1 ...

[67] It is clear from the speech of Lord Oliver that has been quoted that to decide in an action in negligence where the claim is one for economic loss whether the claim is maintainable, the essential question to be asked is the same that has to be asked even where the claim is for physical damage — that has therefore to be asked in every case — that is, whether 'the relationship between the plaintiff and the defendant is such … that it imposes on the latter a duty to take care to avoid or prevent that loss which has in fact been sustained'. In the passage quoted, Lord Oliver made references to *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 and *Caparo Industries Plc v Dickman* [1990] 1 All ER 568. In the latter case Lord Bridge of Harwich said, at p 581B–C:

It is never sufficient to ask simply whether *A* owes *B* a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which *A* must take care to save *B* harmless:

> The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it.

(See *Sutherland Shire Council v Heyman* at p 48 per Brennan J.)

[68] Earlier, at pp 573J and 574A, Lord Bridge, after referring to a series of decisions of the Privy Council and the House of Lords which 'have emphasised the inability of any general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope', said:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other …

[69] The important thing to note from the speeches of Lord Oliver and Lord Bridge that I have quoted is that the question of whether pure economic loss, or any other kind of loss, for that matter, is recoverable in the law of negligence is a question to be determined as a matter of the scope of the duty of care, that is to say, by determining whether, in view of the nature of the relationship between the plaintiff and the defendant, there is a duty imposed on the latter to take care to avoid or prevent the loss.

[70] The Court of Appeal in the *Highland Towers* case also dealt with the question whether pure economic loss is recoverable for the tort of nuisance. Gopal Sri Ram JCA concluded at p 595G–H: 'Pure economic loss in the form of the fall in the value of the land is recoverable for any of the forms of nuisance recognised by the law.' The conclusion was based on *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426, a case about private nuisance, where Lord Lloyd of Berwick, after stating at p 441C–D that private nuisances are of the following three kinds, namely:

> (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land,

said at p 442:

> … It has been said that an actionable nuisance is incapable of exact definition. But the essence of private nuisance is easy enough to identify, and it is the same in all three classes of private nuisance, namely interference with land or the enjoyment

> of land. In the case of nuisances within class (1) or (2) the measure of damages is, as I have said, the diminution in the value of the land. Exactly the same should be true of nuisances within class (3). There is no difference of principle ...

[71] Therefore the only possible damage that can be caused by, and that can be claimed for, a private nuisance is damage in the form of pure economic loss.

[72] I have said that in this court Steve Shim CJSS ruled on the question of pure economic loss in favour of the plaintiffs. He agreed with the Court of Appeal as to its recoverability in negligence and nuisance. As to its recoverability in negligence, he also said in para (24):

> Before us, both the appellant and the respondents are on common ground that recovery for pure economic loss is permitted in the law of negligence. However, they disagree on their [sic] application to the facts of the instant case.

[73] Since, after considering all the issues that arose in the appeal, Steve Shim CJSS ultimately found that MPAJ was liable for damages in negligence and nuisance in respect of post-collapse matters, and since Abdul Hamid Mohamad FCJ agreed with Steve Shim CJSS on all issues except the question of liability for pure economic loss, Abdul Hamid Mohamad FCJ dealt only with that question. In para (52) he said that what had to be decided was 'whether on the facts, MPAJ should be held liable for the pure economic loss suffered by the respondents/plaintiffs. In this respect, I shall confine my discussions to the liability of MPAJ, a local authority, for economic loss suffered by the respondents for its failure to take remedial action after the collapse of Block 1', which in para (54) is stated to be 'the failure of MPAJ to fulfill its promise to come up with and implement the master drainage plan'. In para (55) he said, 'I am only concerned with the failure or delay on the part of MPAJ to come up with and to implement a master drainage plan in an effort to stabilise the hill slope …' And in para (56) he said: 'The question is, does this failure or delay amount to actionable negligence against a public authority, the MPAJ, for pure economic loss?' And in para (72) he said, 'We are actually dealing with the failure on the part of MPAJ to promptly and effectively carry out the drainage master plan that it promised to do. And, we are dealing with a local authority. I am confining my judgment to that factual situation alone'.

[74] To answer the question that he had posed twice, Abdul Hamid Mohamad FCJ resorted to s 3(1) of the Civil Law Act 1956, by which the court is required, in West Malaysia, in the absence of other provisions made by written law, to apply the common law of England (besides rules of equity) as administered in England on 7 April 1956, but 'so far only as the

circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary'. To Abdul Hamid Mohamad FCJ, local circumstances must be considered in determining whether to accept a claim for pure economic loss in negligence. This may be inferred from para (71), where he added: 'However, I shall not venture to say where the line should be drawn'.

[75] Prompted by the statement by Lord Bridge in the *Caparo* case that one of the necessary ingredients in any situation giving rise to a duty of care is 'that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the (party owing the duty of care) for the benefit of the (party to whom it is owed)', Abdul Hamid Mohamad FCJ posed the question for the third time.

> [79] The question then is, considering the public policy and local circumstances, is it fair, just and reasonable to impose a liability on MPAJ, a local authority, for pure economic loss to the plaintiffs for its failure (so far) to come up with and implement the promised drainage master plan or to stabilise the hill slope on Arab Malaysian Land to ensure that no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 and 3?

[76] The answer was given at the end of the three paragraphs that immediately followed:

> [80] A local council is established with a host of duties to perform, from providing and maintaining recreational areas and collecting garbage to providing public transport, homes for the squatters, temporary homes in case of disasters, natural or otherwise, and so on. Indeed, the list is endless. The expectations of residents are even more. These are public duties to all residents or ratepayers within the council's geographical limit. To finance all their activities, local authorities depend mainly on assessment rates and fees for licences. In a democracy as in Malaysia and the kind of attitude of the people, we know too well how difficult it is to increase the rates or the fees even by a few percent. With limited resources and manpower, even if it tries its best (and generally speaking, I say they do) to provide the infrastructure and services, it will not satisfy everybody. People's demands far outweigh their contributions. When services are provided or as a result of infrastructural improvements, the value of their properties goes up, as usually happen, it is taken for granted, as their rights, their good fortune or business acumen. Then there is the attitude of the public from littering and vandalism to resorting to irresponsible means in order to maximise profits, as we see in the facts of this case as narrated by the learned High Court judge.
>
> [81] With limited resources and manpower local councils would have to have their priorities. In my view, the provision of basic necessities for the general public has priority over compensation for pure economic loss of some individuals who are clearly better off than the majority of the residents in the local council area. Indeed, the large sum required to pay for the economic loss, even if a local council has the means to pay, will certainly deplete whatever resources a local council has for the

provision of basic services and infrastructure. Projects will stall. More claims for economic loss will follow. There may be situations where a local council, which may only be minimally negligent, may be held to be a joint tortfeasor with other tortfeasors, which may include irresponsible developers, contractors and professionals. There is no way to execute the judgments against them. Out of necessity or for convenience, the judgment for the full amount may be enforced against the local council. The local council may go bust. Even if it does not, is it fair, just and reasonable that the taxpayers' money be utilised to pay for the 'debts' of such people? In my view, the answer is 'No'.

[82] I do not think that we can compare the 'local circumstances' in New Zealand, for example, with the 'local circumstances' in Malaysia now, be it in terms of development (many Malaysian, though it may not [sic] in the MPAJ locality, are still without water supply and electricity), civic mindedness of, and compliance with laws and bylaws by the general public or, as we see in this case, even by developers, and others. I do not think that, in the present circumstances, on the facts and in the circumstances of this case, it is fair, just and reasonable to impose such a burden on MPAJ or other local councils in this country in similar situations.

In those paragraphs, by 'local council' what must have been intended was 'local authority'. In the present appeal, DBKL submits in effect that by those three paragraphs this court has, pursuant to s 3(1) of the Civil Law Act 1956, made a general ruling, which should apply to all torts, that bars, for policy reasons, claims for pure economic loss against a local authority.

[77] I have to make the following observations. First, although Abdul Hamid Mohamad FCJ undoubtedly was aware that under the common law the question of recoverability of pure economic loss for negligence is a question of determining the scope of the duty of care, in setting out on three occasions the question that he had to answer and in setting out in paras (80)–(82) the considerations that he took into account in arriving at the answer with recourse to s 3(1) of the Civil Law Act 1956, he did not make manifest that the question was considered as one of determining the scope of the duty of care. It would appear as if the answer is simply that, in view of the limited financial resources of a local authority, it would not be fair, just or reasonable that a local authority should be burdened with the liability, which would be crippling, to pay to others damages for pure economic loss for the kind of default that occurred in the *Highland Towers* case. The impression that I form that the answer was not one that resulted from a consideration of the scope of the duty of care that should or should not be imposed on a local authority is fortified by the statement in para (84): 'The discussion in this judgment covers nuisance as well', for if the discussion had been about the scope of the duty of care, it could not cover nuisance as well. Further, if the discussion in paras (80)–(82) had been about the scope of the duty of care, which has to be determined on a case-to-case basis, the discussion would bear the appearance of a discussion for the particular case,

and there would be no question of the conclusion that it gave rise to being seen, as DBKL affects to see it, as a general ruling.

[78] Secondly, on the three occasions on which Abdul Hamid Mohamad FCJ set out the question that he had to answer, he mentioned only MPAJ, albeit with the emphasis that it was a local authority. He also emphasised, as has been seen, that he was confining his judgment to one factual situation alone, that is, the factual situation of 'failure on the part of MPAJ to promptly and effectively carry out the drainage master plan that it promised to do'. And in the last sentence of para (82), where he concluded that he did not think it fair, just and reasonable to impose the burden of paying for pure economic loss, although he spoke of its imposition on MPAJ or other local authorities, he was careful to emphasise that his conclusion was so 'on the facts and in the circumstances of this case', and 'in similar situations'.

[79] I am therefore inclined to construe that conclusion as intended to apply only to MPAJ and to the *Highland Towers* case or, if it was intended to apply to any other local authority in some other case, it will have to be a case, which can hardly occur, where the facts, circumstances and situations are similar.

[80] That this has to be so is fortified by the answer that Abdul Hamid Mohamad FCJ gave to the leave-question about pure economic loss, which I will cite again: 'whether pure economic loss is recoverable under our Malaysian jurisprudence with reference to (a) negligence and (b) nuisance'. The answer was given in para (86):

> [86] While economic loss under limited situations may be allowed, Malaysian courts will have to consider the effects of s 3 of the Civil Law Act 1956 and, considering the 'public policy' and the 'local circumstances', whether it is fair, just and reasonable to allow it on the facts and in the circumstances of the case.

That is the actual, and binding, ruling of this court on the question of pure economic loss for future cases, including the present case. Each case has to be considered, with the application of s 3(1) of the Civil Law Act 1956, on its own facts and circumstances. In view of that answer and of what I said earlier about the scope of the conclusion in para (82), it is clear to me that this court in the *Highland Towers* case did not make a ruling, applicable to other cases, that precludes a claim for pure economic loss against a local authority. My answer to the leave-question about pure economic loss in the present appeal is therefore in the negative.

[81] I would therefore dismiss the appeals of UDA, DBKL and the government with costs.

Zulkefli FCJ (dissenting):

INTRODUCTION

[82] These are three related appeals fixed for hearing before us which involved the same subject matter. The first, is the Civil Appeal No 02–32 of 2007(W) in which the appellant is Uda Holdings Sdn Bhd. The second, is the Civil Appeal No 02–33 of 2007(W) in which the appellant is Dato Bandar Kuala Lumpur ('DBKL'). The third, is the Civil Appeal No 01–9 of 2007(W) in which the appellant is the Government of Malaysia ('the government'). The respondent for all the three appeal cases is Koperasi Pasaraya Malaysia Berhad ('Koperasi Pasaraya'). Koperasi Pasaraya is the plaintiff before the High Court wherein it had filed action against Uda Holdings as the first defendant, DBKL as the second defendant and the Government of Malaysia as the third defendant respectively. The cause of action as pleaded by Koperasi Pasaraya in its amended statement of claim against Uda Holdings, DBKL and the government is founded on public nuisance and breaches of statutory duties. I shall refer the parties in these appeals before this court as they were in the High Court.

BACKGROUND FACTS

[83] The relevant background facts of the case are as follows.

[84] At the commencement of this action in 1997, the plaintiff was running a supermarket business ('supermarket') at the ground floor of a nineteen storey building at No 69, Jalan Haji Hussein, Kuala Lumpur ('the premises'). The plaintiff had started its business at this premises sometime in 1975. The plaintiff being a cooperative society, enjoyed getting customers mainly from its members consisting of about six thousand individual members and fifty cooperative societies eg, Police Cooperative Society, the Armed Forces Cooperative Society and Wilayah Persekutuan Government Servants Cooperative Society. The products sold at the supermarket were mainly food stuff and essential household goods. The main entrance to the supermarket was at Lorong Haji Hussein 3 ('LHH3') where thirty five car parking bays were located. This side road is a thoroughfare and proved to be very convenient to the customers of the plaintiff's supermarket for purposes of loading and unloading passengers and goods to their vehicles.

[85] It is the plaintiff's case that on 20 October 1996, the second defendant acting in concert with the first and the third defendants caused the LHH3 to be closed to all traffic. It began with the first defendant declaring and categorising that part of LHH3 adjacent to the plaintiff's supermarket as a

temporary occupational licence (TOL) after an application by the second defendant who also closed the road to all traffic. Subsequently the first defendant constructed 76 stalls at LHH3.

[86] The first defendant, who at the relevant time known as Urban Development Authority (UDA), a statutory body, intended to construct two multi-storey building on Lot 2347, situated not far from the plaintiff's supermarket on the same Jalan Haji Hussein. It so happened that during that time UDA's land was occupied by unlicensed hawkers. To commence development on the said land the first defendant had to remove the unlicensed hawkers first. To do that the first defendant sought the assistance of the second defendant to have the said hawkers removed from UDA's land. However it was also necessary for the second defendant to locate a new place for the said hawkers. It was decided that the place would be LHH3, that part of public road adjacent to the entrance to the plaintiff's supermarket. The approval of the land administrator for Wilayah Persekutuan Kuala Lumpur, the third defendant, to have the LHH3 converted from a public road to a TOL had also to be obtained. An application to that effect was made by both the first and second defendants. The third defendant granted the application. Once that part of LHH3 was converted into a TOL, the second defendant closed the road to all traffic and the first defendant constructed seventy six stalls with a view to relocate the said hawkers here from UDA's land. Although keys to thirty six stalls had been collected it would appear that only twelve stalls were occupied by the said hawkers. Be that as it may, it was alleged by the plaintiff that its effect on the plaintiff's supermarket business had been very adverse. The number of customers coming to the plaintiff's supermarket began to dwindle. The main reason was due to access problem by cars and difficulty of parking. The road had been barricaded by the second defendant. The car parking bays had been abolished. That area had been congested with so many people, a completely different situation as that before it was closed.

[87] The closure of the road was supposedly for a period of two years. But it turned out that it was only reopened to public after a period of five years. It was closed from 28 October 1996 to 30 November 2001. Due to the road closure the plaintiff's supermarket business suffered tremendously. Despite experiencing substantial losses in the business caused by the closure of the said road, the plaintiff continued to operate the said supermarket at the said premises until September 2001. Then on 1 December 2003, the plaintiff was forced to sell the said premises for a sum of RM6m but with a right to rent it back for a period of five years at a monthly rental of RM60,676. An option to renew this tenancy for a further term of five years at a rental based on prevailing market value was also accorded to the plaintiff by the new owner.

About 2½ years after they shut down the said supermarket, the plaintiff reopened it in February 2004.

FINDINGS OF THE HIGH COURT

[88] The High Court, after a full trial, allowed the plaintiff's claim and awarded judgment in the sum of RM23,734,157 with interest thereon at the rate of 8% per annum from 11 November 1997 and costs. The learned judge of the High Court held that the first defendant, the second defendant and the third defendant had jointly acted unreasonably in relocating the unlicensed hawkers to that portion of LHH3, causing public nuisance especially to the plaintiff. The learned trial judge further held that in doing so, the first defendant, the second defendant and the third defendant failed to consider the hardship caused to a great number of road users and occupiers of that portion of LHH3. As a direct consequence, the plaintiff's supermarket business suffered great loss. The learned trial Jjudge also ruled that the third defendant had unlawfully issued the TOL over that portion of LHH3, that the second defendant had unlawfully closed the same and that the first defendant had unlawfully constructed 76 temporary hawker stalls thereon.

[89] Dissatisfied with the decision of the High Court, the first defendant, the second defendant and the third defendant appealed to the Court of Appeal.

FINDINGS OF THE COURT OF APPEAL

[90] All the three Court of Appeal judges (James Foong, Low Hop Bing and Suriyadi Halim Omar JJCA) upheld the judgment of the High Court that the first defendant, the second defendant and the third defendant were jointly and severally liable to the plaintiff under public nuisance. The Court of Appeal also ruled that as against the second defendant (DBKL) the claim in economic loss was only recoverable under the head of breach of statutory duty.

[91] His Lordship James Foong JCA however dissented with the majority decision on the issue of quantum to be awarded to the plaintiff. His Lordship held that the trial judge had made a mistake in allowing the plaintiff's whole claim on the grounds that the defence had failed to call any rebuttal witnesses. His Lordship then set out and dealt with each head of claim made by the plaintiff and awarded the plaintiff RM8,152,804 with interest thereon at the rate of 8% per annum from 11 November 1997 and costs.

[92] Dissatisfied with the decision of the Court of Appeal, the first defendant, the second defendant and the third defendant sought leave to appeal to this court against the whole decision of the Court of Appeal.

QUESTIONS FOR DETERMINATION BEFORE THE FEDERAL COURT

[93] Leave to appeal was granted on the following three questions:

(1) whether an act done pursuant to a temporary occupation licence ('TOL') resulting in the closure of a public road is a defence to a claim for public nuisance and/or breach of statutory duty;

(2) whether the judgment of the Federal Court in *Majlis Perbandaran Ampang Jaya v Stephen Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 precludes a claim for pure economic loss against a local authority and/or the Government of Malaysia; and

(3) whether the provisions of ss 12 and 46 of the Street, Drainage and Building Act 1974 ('SDBA') confer a right of action against a local authority in respect of a road closure undertaken pursuant to the issuance of a TOL under s 65 of the National Land Code ('NLC').

THE APPEAL

[94] For convenience I shall first deal with questions 1 and 3 together since they concern solely the issue of liability. Question 2, which is, essentially, a relief question of whether a pure *economic loss* is recoverable against a local authority on the assumption there is liability.

[95] It is to be noted at the outset that in relation to the location of the supermarket as shown on the lay-out plan of LHH3, it shows that a closure of part of LHH3 did not result in a denial of access to the supermarket, contrary to the contention of the plaintiff (*see p 1031 of the appeal record Vol 4*). The access from the main road Jalan Hj Hussein and Lorong Hj Hussein Satu was at all times available during the period of closure. The supermarket was situated on the ground floor of a multi-storey building in which five floors were reserved for a car park. These facts would rebut the conclusion drawn by the Court of Appeal that as a result of the closure '*the lifeline of the supermarket's business was disconnected*'. It may be said that the closure undoubtedly inconvenienced the supermarket but, with respect, in my view the Court of Appeal was placing it too high an evaluation to say that the lifeline of the supermarket was severed or disconnected as a result.

COMPLIANCE WITH STATUTORY INSTRUMENTS AND ORDERS

[96] It is also to be noted that the various steps taken leading to the closure of LHH3 were undertaken pursuant to statutory powers and the issuance of the relevant statutory orders or instruments whether by DBKL or the government which can be highlighted as follows.

[97] Firstly, there is the issuance of a TOL to Uda Holdings by the government under s 67 of the NLC over LHH3. The notation on the TOL document reads: '*Maksud menduduki — Tapak gerai untuk penempatan penjaja*' and the TOL was issued under Form 4A of the NLC.

[98] Secondly, the closure was undertaken by the DBKL under the Road Transport Act 1987 ('RTA') in which due notice of intended closure was given, and not under s 5(c) of the SDBA where a closure can be effected with the consent of the state authority. In the result, the Road Transport (Prohibition of Use of Road) (City of Kuala Lumpur) (No 6) Order 1997 was issued under s 70(2) of the RTA on 18 July 1997 closing LHH3 with effect from 14 August 1997 (see *Gazette* Notification No PU (A) 311 at pp 1072–1074 of the appeal record Vol 4). This was preceded by a call for objections dated 8 May 1997 by DBKL published in *Gazette* Notification No 3775 (see pp 1069–1071 of the appeal record Vol 4). No objection was received by DBKL against the making of the order.

[99] Thirdly, the development of LHH3 under the TOL as a hawker centre by the building of seventy six stalls was pursuant to a Development Order dated 29 August 1996 issued by DBKL to Uda Holdings under s 22 of the Federal Territory (Planning) Act 1982 ('FTPA') (see pp 1038–1040 of the appeal record Vol 4).

DUTIES OF DBKL OVER PUBLIC STREETS

[100] It is an acknowledged fact that DBKL has no rights of ownership over the public roads within its jurisdiction. The public streets also do not vest in DBKL. In the case of *Syarikat Perniagaan United Aces Sdn Bhd v Majlis Perbandaran Petaling Jaya* [1997] 1 MLJ 394, the Federal Court held that the vesting provision under s 65 of the Local Government Act 1965 ('LGA') does not apply to 'streets'. Furthermore, there is no vesting provision in the SDBA. Instead s 12(1) of the SDBA, inter alia, states that upon a street being declared a public street, it shall '*forever afterwards be maintained by the local authority*'. I am of the view s 12(1) of the SDBA on its true reading imposes on DBKL a duty of maintenance of a public street, as meaning upkeep and repairs, and not a duty to maintain the character of the road forever as a public street. The provision does not say the street shall '*forever afterwards be*

maintained as a public street by the local authority'. In this regard the Court of Appeal wrongly concluded in its majority judgment that DBKL was under a duty to forever maintain the character of the roads as a public street. A reading of s 4 of the SDBA would dispel any confusion in this regard. Section 4 makes it clear that the word 'maintained' is used in the sense of 'repair' and not of retention of its character as a private street or public street.

[101] In relation to the usage of a public street or a road falling within its authority, it is to be noted that a local authority may not act of its own (see the phrase '*other than a Federal road*' in s 67(a) of the RTA). Further, by s 5(c) of the SDBA it may not without the consent of the State Authority close a public street. I am of the view by s 70(1) read with s 67 of the RTA, a local authority may not without the consent of the Director General of Road Transport prohibit or restrict the use of a road falling within its authority, ie '*a road other than a Federal road*'. In the circumstances, it is beyond the capacity of a local authority to forever ensure the maintenance of a road in its character as a public street. I am therefore of the view that the Court of Appeal was wrong in reading s 12(1) of the SDBA as casting a duty on DBKL to forever retain LHH3 as a public street as opposed to a duty to repair and maintain the road.

WHETHER DBKL HAS BREACHED STATUTORY DUTY

[102] The Court of Appeal has held DBKL liable on the basis of breach of statutory duty. It should be noted that this finding was made for the first time in the Court of Appeal. This is how the Court of Appeal explained its decision:

> DBKL's omission to perform its duty to maintain the road as a public street under s 12(1) and its failure to exercise the powers under s 46(3)(a) to remove the obstruction are obvious manifestations of DBKL's non-fulfillment of its statutory duties.
>
> There can be no doubt that DBKL's breaches of statutory duties under s 12 and s 46 have caused injury to the plaintiff as reflected in the eventual collapse of the business of the supermarket.
>
> In the circumstances, I hold that the supermarket has successfully established breaches of statutory duties occasioned by DBKL.

[103] The Court of Appeal in its judgment relied on the case of *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 to say that the plaintiff had a right of action although s 12 and s 46 of the SDBA did not impose a civil remedy for breach. The Court of Appeal spoke of a presumption in favour of right of action wherein it, inter alia, stated as follows:

Although ss 12 and 46 do not expressly impose a civil remedy for such breaches, there is a presumption that the supermarket as the party injured thereby will have the right of action: see *Cutler* per Lord Simons.

[104] It is my judgment that the Court of Appeal fell into error in its analysis because where the breach of statutory duty alleged is an omission to exercise a statutory power, a determination has first to be made whether there was a duty or obligation to exercise the power in the circumstances or was it a discretion and secondly, if so, whether the failure to exercise the power was an irrational act. The principles were considered and determined by the House of Lords in the case of *Stovin v Wise (Norfolk CC, third party)* [1996] AC 923. It was a case where the country council as the body in charge of the highway in question was charged with damages by an injured motorist for failure to remove an earth bank blocking the view of motorists. Lord Hoffmann for the majority, dealt with the policy of the statute in question whether it gives rise to a private cause of action, and when a failure to exercise a statutory power could be actionable. This is what Lord Hoffmann at pp 952–953 said in his speech:

(1) Whether a statutory duty gives rise to a private cause of action is a question of construction: see *Reg v Deputy Governor of Parkhurst Prison, Ex parte Hague* [1992] 1 AC 58. It requires an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach. Whether it can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision.

(2) In the case of a mere statutory power, *there is the further point that the legislature has chosen to confer a discretion rather than create a duty* … But the fact that Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not to create a right to compensation …

In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, *first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act*, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.

(Emphasis added.)

[105] On the question of whether the policy of the statute as an exceptional ground requires compensation to be paid to a person who suffers loss because the power was not exercised, I find there is nothing in the SDBA in specific the provisions dealing with public streets, to suggest that there is a policy to pay compensation to a person who suffers loss as a result of DBKL failing to do something it was empowered to do over streets. For example in the Malaysian Privy Council case of *Tan Chye Choo & Ors v Chong Kew Moi* [1970] 1 All ER 266, the Privy Council, inter alia, held that breach of a Road Transport Regulation requiring taxis to be kept in a roadworthy condition did not in the absence of negligence give rise to a liability in damages to an individual for its breach; the regulation merely setting a standard of care.

[106] Applying the test as laid out in the case of *Stovin v Wise, Norfolk County Council (Third Party)* [1996] AC 923; [1996] 3 All ER 801 to the present case, it can be seen that no liability for breach of statutory duty could arise against DBKL for failure to act under s 12 or s 46(3)(a) of the SDBA. As regards s 12(1) of the SDBA, I had earlier stated my view that the Court of Appeal has misread the said s 12(1) by misconstruing the word '*maintained*' as requiring an obligation to retain the road forever as a public street and not a duty to maintain the road in terms of repair and up-keep. As regards s 46(3)(a) of the Act, the point to note is that it is couched in discretionary or non-mandatory terms. It reads as follows:

> The local authority *may cause* any such obstruction to be removed or may itself through its servants remove the same to a suitable place, there to remain at the risk of the owner or person offending and may detain the same until the expenses of removal and detention are paid.
> (Emphasis added.)

[107] I am of the view DBKL could not reasonably or legitimately invoke s 46(3)(a) of SDBA to remove the stalls, and thereby the obstruction, because of the TOL and the subsequent legal steps taken to give effect to the TOL by closure of the road and the planning permission. It would have been a different case if the TOL had been quashed by timeous action by the plaintiff. In that event, there might well be an obligation by DBKL to act under s 46(3)(a) and remove the obstacles. In the circumstances of the case, DBKL did not act irrationally in not exercising its discretionary power under s 46(3)(a) and therefore was not in breach of its statutory duties.

THE NON-QUASHING OF THE TOL, THE ROAD TRANSPORT ORDER AND THE DEVELOPMENT ORDER

[108] I shall now deal with the issues on the TOL, the road transport order and the development order which were not quashed or invalidated and therefore remained in force.

[109] The TOL was issued by the relevant government authority to Uda Holdings under s 65 of the NLC for the specific purpose of street trading by the construction of seventy six hawker stalls over LHH3. The Road Transport Order No 6 of 1996 closing the road, and the development order issued by DBKL to construct the stalls, were made subsequent to the TOL and to give effect to the manifest purpose of the TOL.

[110] I am of the view that there was an obligation on the part of the plaintiff to quash or invalidate the TOL and the other statutory orders pursuant to which LHH3 was closed if the plaintiff took the view, as it now does, that the TOL was invalid and the road should not have been closed. It is established law that there is no presumption of invalidity over statutory orders or administrative orders made under a statute. As Lord Radcliffe said in *Smith v East Elloe Rural District Council & Ors* [1956] 1 All ER 855 such orders 'bear no brand of invalidity on its forehead'. The question in that case was whether a compulsory purchase order could be ignored as a nullity because it was said to be made in bad faith. Lord Radcliffe's full statement is instructive wherein he had this to say at p 871:

> At one time the argument was shaped into the form of saying that an order made in bad faith was in law a nullity … But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. *Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders* …
>
> (Emphasis added.)

[111] In the later case of *F Hoffmann La-Roche & Co AG & Ors v Secretary of State for Trade and Industry* [1975] AC 295, Lord Diplock declared the true legal position in stronger terms at p 365 as follows:

> Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another party or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. *Unless there is such challenge and if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed* …
>
> (Emphasis added.)

[112] It is an established rule of interpretation that statutory instruments or administrative orders are presumed valid until set aside by a court of law. In *Boddington v British Transport Police* [1999] 2 AC 143, Lord Irvine LC explained the true legal effect of this presumption at p 155 as follows:

> In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all. The burden in such a case is on the defendant to establish on a balance of probabilities that the subordinate legislation or the administrative act is invalid: see also *Reg v Inland Revenue Commissioners, Ex parte TC Coombs & Co v IRC* [1991] 2 AC 283. This is the principle to which Lord Diplock referred in *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295

[113] Therefore, in the present case when it came up before both the High Court and the Court of Appeal, the TOL and the two subsequent statutory instruments or orders, namely the Road Transport Order No 6 of 1996 and the development order must be taken to have remained in force. Furthermore, on this point, the Evidence Act 1950 in s 114(e) makes the presumption that all official acts are deemed valid unless proven otherwise.

[114] It is to be noted that there were obiter remarks both in the High Court and the Court of Appeal that the TOL was invalid because it was given over a site used as a public street. If so, that was an objection on which judicial review could have been sought by the plaintiff or an appeal lodged under s 418 of the NLC by it as an aggrieved party where this argument could have been considered head-on by the court and a decision made whether to uphold the TOL or strike it down. The Court of Appeal in my view was influenced by the decision of the English Court in *Vasiliou v Secretary of State for Transport* [1991] 2 All ER 77 that planning permission should not have been granted closing a public road without considering its adverse effect on the business of traders relying on it. However, the Court of Appeal in the present case failed to appreciate that in *Vasiliou*'s case the aggrieved person had made a challenge to the planning order resulting in a quashing of the planning order.

[115] It is unlike the case here where the Court of Appeal was merely asked to assume or presume that the TOL was invalid. Nevertheless, I find it is somewhat unclear how the Court of Appeal had actually approached this question. Initially this is what the Court of Appeal said:

> It is pertinent for me to note that the learned trial judge had, after a full hearing on the action, specifically found the validity of the TOL was a non-issue. That being the case, His Lordship view that the TOL had been invalidly issued was, at

best, mere obiter dictum and not ratio decidendi. Hence, I do not feel the necessity to delve upon this non-issue any further. A

[116] But later, the judgment says this:

It is clear to me that the TOL was issued in respect of a public road heavily used by members of the public and the occupiers of the buildings along the road. The TOL could not override or interfere with their daily right or enjoyment in the use of the road. It cannot simply disregard the hardship caused to users of the road generally and the supermarket specially. B

C

[117] The separate judgment of James Foong JCA says this to like effect:

I am of the view that aside from DBKL, the Government of Malaysia is also liable to the respondent. This was caused by the act of the Land Administrator, Kuala Lumpur, a servant and/or agent of the latter, in issuing the TOL to a public road (Lorong Haji Hussein 3) and for the purpose of erecting the stalls thereon. This is contrary to the National Land Code and Road Transport Act 1987. D

[118] Although the observations above were obiter they seemed nevertheless to have influenced all the judges in the Court of Appeal to hold that the TOL was not a defence to the plaintiff's claim in public nuisance or breach of statutory duty. I am of the view two criticisms can be made of the approach taken by the Court of Appeal. Firstly, the Court of Appeal had ignored the established rule of the presumption of validity of statutory instruments or orders or administrative orders unless quashed or set aside in judicial proceedings brought for that purpose, a point which I had earlier discussed and the case authorities cited in support. Secondly, in both judgments there was a failure to consider the relevant provisions of the NLC under which the TOL was issued or the statutory provisions under which the Road Transport Order No 6 of 1996 or the development order were issued. It is important that these relevant statutory provisions be examined. E F G

[119] It is to be noted s 40 of the NLC vests all state land in the State Authority. By s 65(1) and (2) of the NLC the relevant authority may issue a TOL over state land 'for any purpose' other than one prohibited by s 42(2) of the NLC (being extraction of the produce of the land). Therefore there is no statutory restriction against issuing a TOL over a public road 'for any purpose' although like in *Vasiliou*'s case the reasonableness of that decision may be challenged in judicial review proceedings where it impacts adversely on the legal rights of others. However, as seen here the plaintiff had failed to do that. I am of the view, in the circumstances of the case DBKL when faced with a TOL issued by the proper authority in its proper form, and with a clear statement of its purpose, DBKL was therefore obliged to give effect to it. In this respect, s 67(2) of the NLC expressly declares that every TOL '*shall have* H I

A *effect*' subject to the conditions in Form 4A and the TOL itself. DBKL was therefore obliged by s 67(2) of the NLC to give effect to the TOL.

[120] A reference to s 44(1)(a) of the NLC states, inter alia, that the TOL holder has 'exclusive use and enjoyment' of the land. This has judicially been held to mean that he is entitled to assert his rights over all trespassers (see the cases of *Mohamed Said v Fatima* [1962] MLJ 328 and *Karupannan v Balakrishnen (Chong Lee Chin & Ors, third parties)* [1994] 3 MLJ 584). Thus Uda Holdings as the TOL holder, was clothed with all personal rights to exercise exclusive use and enjoyment of LHH3 for the purpose for which it was issued and for the stated duration. It would also mean that it was not opened to DBKL or any other party to interfere with the rights now possessed by Uda Holdings over LHH3.

[121] It is also to be noted by virtue of s 67(2) of the NLC a TOL is issued on conditions. By s 67(4) of the NLC a TOL is issued by way of the statutory Form 4A. The schedule to Form 4A carries certain mandatory conditions one of which is that a right of revocation for breach of condition is reserved by the issuing authority. Thus if Uda Holdings had utilised LHH3 for a purpose other than that stated in the TOL it could loose the TOL by non-renewal the following year under s 67(3) of the NLC or by revocation under Form 4A for breach.

[122] It is my judgment that the sum effect of the above matters, and the statutory provisions referred to is that the TOL was a valid and effective legal document and all parties were obliged to recognise it as valid unless it had been invalidated by a court of law. This, the plaintiff had failed to do.

WHETHER THERE COULD BE A COLLATERAL CHALLENGE

[123] A question posed at the stage of the appeal before us is whether the plaintiff could now in the present proceedings collaterally challenge the TOL and the two subsequent orders when it had failed to directly challenge and invalidate these three statutory instruments in the High Court. The Court of Appeal seems to have thought that it could, and proceeded on the basis that the TOL was bad in law, although no pronouncement was made by it over the vires of Road Transport Order No 6 or the development order.

[124] It is my view that the Court of Appeal was wrong because there is no unqualified right to launch a collateral challenge to a statutory instrument or order that a party adversely affected had failed to challenge earlier in direct proceedings brought for that purpose. An exception lies in criminal proceedings where a defendant may challenge the vires of the subsidiary

legislation under which he is charged as part of his defence (see *Boddington*'s case). But in all other cases, there are two restrictions in place which can be highlighted as follows.

[125] Firstly, a collateral challenge will only be allowed in limited cases where an act, order or decision was 'Bad On the Face of It'. This point was considered by the Supreme Court in *Penang Development Corp v Teoh Eng Huat & Anor* [1993] 2 MLJ 97, where the issue arose whether a clause in a housing sale contract was ultra vires the Housing Developers Act 1966. The vendor, a state authority, sought to defend a late delivery claim for damages by a collateral challenge that the compensation clause in the contract was ultra vires the Act. His Lordship Jemuri Serjan CJ (Borneo), in delivering the judgment of the court rejected the challenge saying at p 108 as follows:

> The corporation, after amending the statement of defence, raised the vires defence and this defence inexorably entails making a declaration of invalidity. *The normal practice is for an aggrieved party affected by the ultra vires act to challenge its validity by judicial review either under O 53 r 1 by way of certiorari or by a declaration under O 15 r 16 of the Rules of the High Court 1980, ie by direct attack*. As a general rule the court will allow the issue of invalidity to be raised in any proceedings where it is relevant. Where some act or order is invalid or void the consequences are followed out logically: See *Wade on Administrative Law* (6th Ed) at p 333 where he gave instances when direct attack on vires act may be made. By way of illustration he quoted cases where actions for damages were brought against magistrates and judges of inferior courts on account of orders made by them outside their jurisdiction. *If the order was bad on its face the court would treat it as invalid. But if the jurisdictional defect was not visible on the face as is in our case, the court would require the order first to be quashed in separate proceedings before the action for damages could be examined. Collateral attack was thus allowed in the first case but not in the second.*
>
> (Emphasis added.)

[126] Applying the test of 'Bad on the Face of It' to the present case, it cannot be said that the TOL was patently bad on its face. It was not, for example, issued by an authority that had no power to issue it nor was it issued over land prohibited under s 42(2) of the NLC. On the contrary, there is every ground to believe that the TOL is a valid document as earlier discussed.

[127] Secondly, a collateral challenge is refused where the statute itself precludes such a challenge. The principle was stated in *Boddington*'s case at p 160 in these terms:

> … in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity or subordinate legislation or an

A administrative act under it. *There are situations in which Parliament may legislate to preclude such challenges being made* …

(Emphasis added.)

B **[128]** The Privy Council in *McGuire v Hastings District Council* [2002] 2 NZLR 577 reiterated that collateral challenges may be precluded by statute wherein at p 590 it had this to say:

C What counsel for the appellants have invoked are passages in the speeches to the effect that a collateral challenge to the validity of an administrative decision may be raised in civil proceedings... These passages are qualified, however by recognition that a particular statutory context or scheme may exclude such collateral challenges, *R v Wicks* [1998] AC 92 being an example in the planning field.

D

[129] The *Boddington*'s principle was applied recently by the Federal Court in *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 7 MLJ 1; [2007] 6 CLJ 245, where a public servant who was dismissed from service because of a detention order made on him was E precluded from challenging his dismissal by collaterally questioning the detention order which he had not previously challenged directly. Applying the *Boddington*'s principle to our case, it seems clear that the NLC precludes a collateral challenge to a TOL. By s 67(2) of the NLC it is declared that every TOL '*shall have effect*' subject to its conditions, which means that a TOL F takes effect for its purposes immediately upon its issuance. I am therefore of the view in the circumstances of the present case, the NLC statutorily precludes by way of s 67(2) of the NLC a collateral challenge to the issuance and operation of a TOL.

G **[130]** It is noted that the Court of Appeal in rejecting the notion that the TOL provided a defence to the claim on public nuisance or breach of statutory duties had this to say:

H The TOL does not and could not clothe the three defendants with a carte blanche, licence or defence to cause, create or bring about public nuisance or breaches of statutory duties.

[131] On the above findings made by the Court of Appeal, Dato' Cyrus Das, learned counsel for the second defendant submitted that there was no I consideration by the Court of Appeal of the legal principles involved in a contest of this sort, namely, where on the one hand a defendant is exercising statutory duties or acting under a statutory order, and on the other the plaintiff complains that the exercise of those functions causes a public nuisance. He further argued that this contest involves a legal concept which

the House of Lords in *Department of Transport v North West Water Authority* [1983] 3 All ER 273 had considered in some depth wherein they reversed the decision of Webster J at first instance (see [1983] 1 All ER 892) on his conclusion, but adopted the four propositions that Webster J had tabulated in cases of this sort as follows:

(1) In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a duty imposed on it by statute;

(2) It is not liable in those circumstances even if by statute it is expressly made liable, or not exempted from liability, for nuisance;

(3) In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a power conferred by statute if, by statute, it is not expressly either made liable, or not exempted from liability, for nuisance; and

(4) A body is liable for a nuisance by it attributable to the exercise of a power conferred by statute, even without negligence, if by statute it is expressly either made liable, or not excepted from liability for nuisance.

[132] In the said case of *Department of Transport v North West Water Authority* the question was whether the Water Authority was liable to the Department of Transport for the cost of repairing a street which was extensively damaged by a burst water main that the Water Authority had laid under the street. The Water Authority was under a statutory duty to supply water to the area where the damaged street was located. The question was whether the Water Authority was liable in damages for nuisance caused without negligence. The House of Lords held that the Water Authority was exercising a statutory duty and therefore the first proposition applied to exempt liability at common law in the absence of negligence. They further held that even if it was the exercise of a statutory power, inviting the application of the third and fourth propositions, the relevant statutory provision was not explicit enough in imposing liability or exempting liability for damage caused to a street by water works as opposed to damage caused to a bridge or other property of a transport authority.

[133] In the present case there is no suggestion of any negligence on the part of DBKL. Thus applying the common law test I am of the view DBKL would be exempted from liability in nuisance whether it be for the exercise of a statutory duty or a statutory power. On this same point the relevant provisions of the NLC, the SDBA, the RTA and the FTPA may be examined.

A It may be said that none of these mentioned statutes impose expressly a liability in nuisance for the exercise of any duty or power under those statutes nor do they expressly exempt liability.

B **[134]** I am of the view on the basis of the exercise of a statutory duty or a statutory power, the first and third proposition as laid down in the case of *Department of Transport v North West Water Authority* case will apply to excuse DBKL from the claim in nuisance against it. By the first proposition, DBKL was under a statutory duty to act on the TOL submitted to it by Uda Holdings and the government. By s 67(2) of the NLC the TOL is declared C to 'have effect' upon issuance, and DBKL was therefore under a statutory duty to recognise and act on it since the TOL was over a road falling within its authority, ie a road 'other than a federal road' under s 67(a) of the RTA. By the third proposition, DBKL was obliged consequent to the TOL to exercise its statutory powers under s 70(1) of the RTA to close the road. D Otherwise, the TOL would be rendered useless and ineffective or, alternatively, any refusal by DBKL to close the road would be to frustrate the TOL.

E **[135]** Likewise, I am of the view DBKL was obliged to exercise its statutory powers to consider the issuance of planning approval vide the development order for the construction of the seventy six hawker stalls. The evidence shows that the approval process in terms of lay-out conditions and sanitation conditions were duly met before the development order was issued. In this regard I am of the view the Court of Appeal failed to consider the applicable F legal principles in cases of this sort, and accordingly its general statement that the TOL is not a defence to the claim in nuisance and breach of statutory duty cannot be defended.

G **[136]** Learned counsel for the second defendant further argued that a point or feature not considered by the Court of Appeal is the case of 'inevitable nuisance' to the public caused by the carrying on of certain activities authorised by law or by statute. Learned counsel referred to us a good example is the vibration caused to premises adjoining the railway line by H operating a railway train or fumes from an electricity generating plant (see the case of *London, Brighton South Coast Railway Co v Truman* (1885) 11 App Cas 45). The classic statement on 'inevitable nuisance' which the common law recognises as not being actionable because of it being a statutory activity or activity authorised by statute is that of Lord Dunedin in the case of I *Manchester Corporation v Farnworth* [1930] AC 171 wherein His Lordship at p 183 had this to say:

> When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance *is the inevitable result of the making or doing so authorised*. The

onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

(Emphasis added.)

[137] The above principle was adopted by the House of Lords in the more recent case of *Allen v Gulf Oil Refining Ltd* [1981] AC 1001. It was a case where an oil refinery was authorised by statute to be built in an area near a village. The complaint was that the fumes from the refinery constituted a public nuisance. In rejecting liability, the House of Lords held that the statute expressly or by necessary implication authorised the building of the refinery at that site, and that the nuisance was the inevitable result of constructing a refinery on the land. Lord Wilberforce said the common law immunity extends to the nuisance that is '*an inevitable result*' and went to state as follows:

It is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance … (para F, p 1011) … It confers immunity against proceedings for any nuisance which can be shown (the burden of so showing being upon the appellants) to be the inevitable result of erecting a refinery upon the site — … To the extend and only to the extent that the actual nuisance (if any) caused by the actual refinery and its operation exceeds that for which immunity is conferred, the plaintiff has a remedy. (Paras B-C, p 1014)

[138] Applying this principle to the facts of the present case I am of the view the issuance of the TOL over LHH3 led to the '*inevitable result*' of the road being closed. This in reality is the complaint, namely, the public nuisance of obstruction of traffic. On the facts of this case the so-called public nuisance was the inevitable result of the coming into force of a statutory instrument in the form of the TOL. The TOL was therefore a statutory defence to the claim in public nuisance.

[139] It is my judgment on the liability question that question 1 should be answered in the affirmative and that of question 3 should be answered in the negative. To sum up I would state that the TOL for all the reasons already stated provides a valid statutory defence to the claim in public nuisance or breach of statutory duty. Further, that neither s 12 nor s 46 of the SDBA gives rise to a cause of action for breach of statutory duty because it was not obligatory in law for DBKL to have exercised the power under s 46 to remove the so-called obstacles.

A QUESTION 2: THE ECONOMIC LOSS QUESTION

[140] Finally, I shall deal with question 2 on the economic loss question. The question posed is whether there could be recovery for pure economic loss against a local authority and/or the government, and whether the recent judgment of the Federal Court in *MPAJ v Stephen Phoa* [2006] 2 MLJ 389 ('the *Highland Towers* case') precludes such recovery.

[141] The question that may be first asked is what is the meaning of '*pure economic loss*'. To put it simply pure economic loss is financial or pecuniary loss that does not arise from any physical damage to the person or property (see the case of *Pilba Trading & Agency v South East Asia Insurance Bhd & Anor* [1998] 2 MLJ 53). The legal position in Malaysia in relation to awards for claim for pure economic loss has been succinctly dealt with in the *Highland Towers* case. His Lordship Abdul Hamid Mohamad FCJ (as he then was) in coming to his decision that the local authority, MPAJ was not liable on grounds of public policy and local circumstances in that case also dealt with the general position of the law in Malaysia with regard to claims for pure economic loss. His Lordship was of the view that Malaysian courts do not readily award claim for pure economic loss and the courts recognise the need to limit recoverability for pure economic loss. In his judgment His Lordship also referred to several local cases such as the cases of (1) *Pilba Trading & Agency v South East Asia Insurance Bhd & Anor*; (2) *Kerajaan Malaysia v Cheah Foong Chiew & Ors* [1993] 2 MLJ 439 and (3) *Nepline Sdn Bhd v Jones Lang Wootton* [1995] 1 AMR 451. It is clear from all these cited cases, the position in Malaysia is that our courts have been inclined to disallow claims for pure economic loss. If at all the court in allowing the claim as in *Nepline*'s case, did so on the ground that the claim was in respect of a definite amount which had already been paid by the appellant and it was that amount only which the appellant then sought to recover.

[142] It is to be noted that the Federal Court in the *Highland Towers* case was concerned only with pure economic loss for an action in negligence and nuisance. The majority judgment in that case, decided largely on policy grounds, that there should be no recovery for economic loss against a local authority. In view of the fact that the *Highland Towers* case did not deal with breach of statutory duties, the Court of Appeal in the present case took the view that the restrictions in economic loss recovery stated in that case would not apply to a head of claim under breach of statutory duties. This is what the Court of Appeal said:

> In my view, DBKL may rely on the majority judgment of the Federal Court to exclude liability from the supermarket's claim for pure economic loss based on negligence and nuisance only. With the utmost respect, the majority judgment

does not provide DBKL with an insulation or immunisation against its liability arising from breaches of statutory duties. A

[143] However I find that the Court of Appeal failed to comprehensively analyse for itself whether there should be recovery against a local authority for pure economic loss for breaches of statutory duty. The error of the Court of Appeal is two-fold: B

(1) Failing to enquire why the policy considerations applicable to actions in negligence and nuisance as stated by the Federal Court in the *Highland Towers* case should not also apply to breaches of statutory duty; and C

(2) Failing to consider the statutory scheme of the SDBA to ascertain if such claim for economic loss is recoverable.

[144] On the first point of error made by the Court of Appeal I am of the view that although the Federal Court in the *Highland Towers* case expressly referred to negligence and nuisance in its judgment, the policy considerations must necessarily refer and extend to all claims in tort, resulting in economic loss brought against local authorities, as otherwise, the rationale of the Federal Court decision (ie to preclude such claims against local authorities), would be lost. In its (majority) judgment, the Federal Court through Abdul Hamid Mohamad FCJ (as he then was) stated the policy considerations at pp 423–424 as follows: D E

> A local council is established with a host of duties to perform, from providing and maintaining recreational areas and collecting garbage to providing public transport, homes for the squatters, temporary homes in case of disasters, natural or otherwise, and so on. Indeed, the list is endless. The expectations of residents are even more. These are public duties to all residents or ratepayers within the council's geographical limit. To finance all their activities, local authorities depend mainly on assessment rates and fees for licences. In a democracy as in Malaysia and the kind of attitude of the people, we know too well how difficult it is to increase the rates or the fees even by a few percent. With limited resources and manpower, even if it tries its best (and generally speaking, I say they do) to provide the infrastructure and services, it will not satisfy everybody. People's demands far outweigh their contributions. When services are provided or as a result of infrastructural improvements, the value of their properties goes up, as usually happen, it is taken for granted, as their rights, their good fortune or business acumen …
>
> With limited resources and manpower local councils would have to have their priorities. *In my view, the provision of basic necessities for the general public has priority over compensation for pure economic loss of some individuals who are clearly better off then the majority of the residents in the local council area. Indeed, the large sum required to pay for the economic loss, even if a local council has the means to pay, will certainly deplete whatever resources a local council has for the provision of basic*

F G H I

> *services and infrastructure. Projects will stall.* More claims for economic loss will follow. There may be situations where a local council, which may only be minimally negligent, may be held to be a joint tortfeasor with other tortfeasors, which may include irresponsible developers, contractors and professionals. There is no way to execute the judgments against them. Out of necessity or for convenience, the judgment for the full amount may be enforced against the local council. *The local council may go bust. Even if it does not, is it fair, just and reasonable that the taxpayers' money be utilised to pay for the 'debts' of such people? In my view, the answer is 'No'.*
>
> (Emphasis added.)

[145] The policy considerations behind the phrase '*fair, just and reasonable*' to impose liability at common law is taken from the case of *Caparo Industries Plc v Dickman* [1990] 2 AC 605. In *Caparo*'s case, it was held that there is a three question test to determine the issue, ie:

(a) whether the damage suffered by the plaintiff is reasonably foreseeable;

(b) whether there is relationship of proximity between the plaintiff and defendant; and

(c) whether it is '*just, fair and reasonable to impose such claim*'.

[146] In the *Highland Towers* case the majority judgment of the Federal Court found that the third test above as matching the requirements of s 3(1) of the Civil Law Act 1956 ('CLA') which specifically provides, inter alia, that '*the common law of England shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary*'.

[147] On the impact of s 3 of the CLA, the Federal Court in *Highland Towers* case said at p 424 as follows:

> While economic loss under limited situations may be allowed, Malaysian courts will have to consider the effect of s 3 of the Civil Law Act 1956 and, considering the 'public policy' and the 'local circumstances', whether it is fair, just and reasonable to allow it on the facts and in the circumstances of the case'.

[148] On '*local circumstances*' itself under s 3 of the CLA, the Federal Court in *Highland Towers* case at p 424 said as follows:

> I do not think that we can compare the 'local circumstances' in New Zealand, for example, with the 'local circumstances' in Malaysia now, be it in terms of development (many Malaysian, though it may not in the MPAJ locality, are still without water supply and electricity), civic mindedness of, and compliance with

laws and bylaws by the general pubic, or as we see in this case, even by developers, and others. *I do not think that, in the present circumstances, on the facts and in the circumstances of this case, it is fair, just and reasonable to impose such a burden on MPAJ or other local councils in this country in similar situations.*

(Emphasis added.)

[149] It is my considered view that the above reasoning of the Federal Court in the *Highland Towers* case would apply across the board to cover all torts. It should be seen that the considerations of 'local circumstances' and whether a local authority should be burdened with a huge financial liability on account of a single resident suing has nothing to do with the type of tort action on which the resident found his claim. In point of principle, these policy considerations have nothing to do with '*negligence*' or '*nuisance*' but everything to do with a pure economic loss award in tort against a local council, which becomes a financial burden on it. In other words, if it is a pure economic loss in tort, the reasoning of the Federal Court in the *Highland Towers* case is that it should be barred under s 3 of the CLA as non-recoverable for policy reasons. Otherwise, one is left with the anomaly of whether a huge economic loss claim in negligence is barred but an equally large economic loss claim under a '*non-negligence*' head is admissible against a local authority. That in my view would surely defeat the policy considerations stated by the Federal Court in the said *Highland Towers* case.

[150] In the Canadian case of *St Elizabeth Home Society v Hamilton City* [2005] OJ 5369, the Ontario Superior Court concluded there was no distinction in principle between a negligence and non-negligence claim for recovery of pure economic loss. The court observed at paras 160–162 as follows:

I conclude that the special treatment of recovery of pure economic loss by the judiciary should apply to tort law in general when the applicable policy concerns exist and should not be restricted to recovery for pure economic loss resulting solely from negligence.

Pure economic loss claims do arise in other areas of tort law such as defamation nuisance and the intentional economic torts (see *Feldthusen, Economic Negligence: The Recovery of Pure Economic Loss*, at p 1). It seems sensible that if policy concerns lead to restrictions on recovery of pure economics loss in negligence, then such restrictions should also exist if the same policy concerns arise in other areas of tort law.

There appears to be no authoritative statement in the jurisprudence that restrictions on pure economic loss do not apply to other areas of tort law.

[151] On this point of principle I am in agreement with the submission of learned counsel of the second defendant that there is no good reason to

distinguish between negligence and non-negligence claims to bar a pure economic loss claim against a local authority. The Federal Court was able to say for good reason in the *Highland Towers* case in a single line as this: '*The discussion in this judgment covers nuisance as well*.' I would hold that the same policy considerations will also apply to a claim based on breach of statutory duty. In the result, I am of the view that the Court of Appeal erred in holding that the Federal Court decision in the *Highland Towers* case should only be confined to claims in negligence and nuisance when the overriding policy considerations stated therein make it imperative to be applicable to all actions in tort which result in economic loss claims being brought against a local authority.

[152] On the second point of error made by the Court of Appeal, I find that the Court of Appeal failed to consider the statutory scheme of the SDBA on whether claims for economic loss are maintainable. For example, in *Rowley & ors v Secretary of State for Department of Works and Pensions* [2007] 3 FCR 431, the Court of Appeal therein, in asking itself the question whether a public authority owes a common law duty of care not to cause economic loss, on a claim for breach of statutory duty, held that it would be necessary, in addition to the tests referred to in *Caparo*'s case to consider the following issues:

(a) whether to impose a duty of care would be in inconsistent with the statutory scheme it is acting; and

(b) the relevance of the fact of whether the statute confers no private law right of action for breach of statutory duty.

[153] It is my judgment that the Court of Appeal in the present case in coming to its conclusion on this issue in holding DBKL liable, failed to have regard to the overall statutory scheme and framework of the SDBA. In determining whether a claim for recovery of economic loss is recoverable from an alleged breach of statutory duty, it is important for the court to have regard to the overall scheme of the relevant statute. This was the approach taken by the House of Lords in *Murphy v Brentwood District Council* [1990] 2 All ER 908, where it was held, inter alia, that there was '*nothing in the statutory provisions which even suggest the purpose of the statute was to protect owners of buildings from economic loss*'.

[154] It is also imperative to determine the primary purpose or concern of the relevant statutory scheme and in that context, ascertain whether it was intended for the protection of economic interests of a particular class of persons (see the case of *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504). It would be noted, in this regard, that the preamble to

the SDBA states as follows: '*An Act to amend and consolidate the laws relating to street, drainage and building in local authorities in Malaysia and purposes connected therewith*'. Based on the above preamble there is nothing to suggest that it is intended to provide compensation for financial loss in the manner sought by the plaintiff.

[155] Learned counsel for the second defendant submitted that the considerations in question 3 as to whether the relevant provisions of ss 12 and 46 of the SDBA confer a private right of action are equally relevant in the context of whether economic loss is recoverable for a purported breach of statutory provisions. I am of the view looking at the terms of the provisions in s 12 and s 46 of the SDBA, it would show that it precludes any construction that any breach thereof would result in a party being able to claim financial loss arising there from. In the English Court of Appeal case of *Wentworth v Wiltshire County Council* [1993] 2 All ER 256 Parker LJ, inter alia, held that in relation to the Highways (Miscellaneous) Provisions Act 1961, the right to recover damages from a highway authority was limited to personal injury or damage loss of non-repair of the highway and not a claim for loss of profits (ie economic loss). The facts are relevant to the present case because there a diary farmer claimed against the local council in pure financial loss for failing to upkeep the access road to his farm so much so that the dairy lorries refused to use the road to collect milk from his farm. He claimed financial loss as a result. The approach taken to see whether there could be recovery for financial loss as a matter of statutory policy is seen in this extract from the judgment of Parker LJ wherein at p 262 he had this to say:

> Mr Reid QC for the respondent submits however that the action lies because here there is a public duty and the respondent has, by its breach, suffered direct damage over and above that suffered by ordinary members of the public. On principle, therefore, he should be able to recover. Moreover, he points out that, where a highway through neglect has become impassable to traffic, the position is in essence the same as it would be if the highway were obstructed and there is no doubt that economic damage resulting from obstruction is recoverable. Whilst I appreciate the force of his arguments the matter is in the end one of statutory construction and in my judgment the intention of Parliament, to be gathered from wording of the two Acts and the pre-existing state of the law, is clear.

[156] The approach and the consideration made in the above mentioned case in my view would equally apply to any purported breach of s 12 of the SDBA which are clearly not intended to extend protection nor provide rights to owners of adjoining premises of a street to claim financial losses by reason of any closure thereof. Similarly, in respect of any purported breach of s 46 of the SDBA, it is clear that where a statutory provision confers a discretion

on a local authority that is an indication that the policy of the act conferring the power was not a right to compensation (see the case of *Stovin v Wise Norfolk CC, third party*).

[157] In the result it is my judgment that the Court of Appeal was in error in holding that DBKL was liable for pure economic loss by reasons of alleged breach of statutory duty and the question must be answered in favour of DBKL. Question 2 should therefore be answered affirmatively to cover all tort claims against a local authority and/or the government based on pure economic loss.

CONCLUSION

[158] For the reasons already stated I would allow all the three appeals by the first defendant, the second defendant and the third defendant with costs. All orders made by the Court of Appeal are hereby set aside. Consequently, it follows that all orders made by the learned trial judge of the High Court on liability and quantum are also set aside. All deposits paid are to be refunded to all the three defendants.

Appeals dismissed with costs.

Reported by K Nesan